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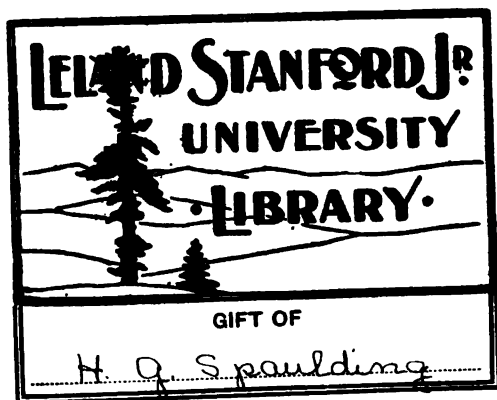
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Out. 424, 46, 63, 65, 83, 86, 98.

SELECTED CASES
AND
STATUTES
ON
THE LAW OF BANKRUPTCY.

EDITED AND ANNOTATED
BY
SAMUEL WILLISTON,
PROFESSOR OF LAW IN HARVARD UNIVERSITY.

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CASES ON BANKRUPTCY.

HISTORICAL INTRODUCTION.

ENGLAND.

THE first bankrupt act in England was 34 & 35 Henry VIII. c. 4. The object was to assist creditors in collecting their claims if their debtors, by absconding or keeping within their houses, made ordinary process inadequate. To this end the Chancellor and other officers were empowered to take the bodies of "such offenders" as well as their property. The statute further provided for the sale of the property and distribution of the proceeds ratably among the creditors, and for the detection, avoiding, and punishment of fraudulent conveyances and detention of the bankrupt's property.

The next statute, 13 Eliz. c. 7, confined the possibility of bankruptcy to traders, but increased the number of acts of bankruptcy to six, all, however, like those in the preceding act, indicating an intent to defraud creditors of their ordinary legal remedies against the person or property of their debtors. The Chancellor was authorized upon complaint against a bankrupt to appoint commissioners to take charge of the bankrupt's property and its distribution. The bankrupt was required to deliver himself up after proclamation, on penalty of fine or imprisonment. From the construction of this statute, rather than from its express words, the doctrine was established that the property of the bankrupt passed to the commissioners, by relation, as of the time of the first act of bankruptcy. It was also expressly provided that property subsequently acquired by the bankrupt should pass to the commissioners. The creditors, if not fully paid by the bankruptcy proceedings, retained their ordinary legal remedies against their debtor.

The general system of bankruptcy legislation shown by these statutes — a *quasi* criminal proceeding against a trader seeking to defraud his creditors of their remedies, a proceeding from which the bankrupt derived no benefit — was elaborated by later statutes, but not fundamentally changed for many years. The important changes gradually made by later statutes may be briefly stated: —

1 James I. c. 15, added as an act of bankruptcy lying in prison six months or more on being arrested for debt, — a state of affairs which

might occur whenever a trader was insolvent, though not fraudulent. It also introduced the first protection to parties dealing with one who had committed an act of bankruptcy, but without notice of this fact. A debtor of the bankrupt who paid his debt under such circumstances was discharged.

21 James I. c. 19, added as an act of bankruptcy mere non-payment of debts to amount of one hundred pounds within six months after they were due and process served. It introduced the doctrine that if bankrupts "shall, by the consent and permission of the true owner and proprietary, have in their possession, order, and disposition any goods or chattels whereof they shall be reputed owners, and take upon them the sale, alteration, or disposition as owners," the commissioners shall have power to sell such goods and chattels for the benefit of the creditors. A second protected transaction was established: A purchaser for good and valuable consideration was protected from the effect of any act of bankruptcy committed five years or more before suing out of the commission.

13 & 14 Charles II. c. 24, was passed to avoid the effect of the decision in Wostenholme's case, in which Sir John Wostenholme was held to be a trader by virtue of his membership in the East India Company, and enacted that membership in that company and similar ones should not have such effect.

4 & 5 Anne, c. 17, introduced a most important change in bankruptcy legislation. It had been found that bankrupts were not sufficiently ready to surrender themselves and their property; and to remedy this, the penalty for failure to do so was made felony without benefit of clergy; and at the same time, as a reward for surrendering himself and conforming in all things to the law, it was provided that a bankrupt should receive a small allowance from his estate and a discharge from all debts due before the bankruptcy. These benefits were not to be allowed a bankrupt who had given when insolvent above one hundred pounds in marriage with any of his children, or who had lost at gaming five pounds in one day or one hundred pounds within the year next preceding the bankruptcy. It was further made a condition precedent to the bankrupt's rights that the commissioners should certify to the Chancellor that the bankrupt had conformed in all things to the act. This statute also first provided for the case of mutual credit between the bankrupt and another, though in practice from the first the commissioners only considered the balance to be the debt due to or from the bankrupt. The act was to continue in force for three years.

5 Anne, c. 22, added as a prerequisite to the bankrupt's allowance and discharge that the certificate required by the preceding act should be signed by four parts in five in number and value of the creditors who had proved their debts. Assignees to take charge of the bankrupt's property, appointed temporarily by the commissioners, and afterwards chosen by a majority in number of the creditors present, were first introduced by this statute.

10 Anne, c. 15, repealed some acts of bankruptcy introduced by 21 James I. c. 19, especially mere non-payment of debts to the amount of one hundred pounds for six months after they were due and process served.

5 George I. c. 24, again gave bankrupts the benefit of discharge and allowance which they had enjoyed under 4 & 5 Anne, c. 17, during the three years which that act remained in force, and added a protection from arrest while going to, staying with, or coming from the commissioners, in obedience to their summons. An additional prerequisite to the granting of the certificate by the commissioners was established, — the oath of the bankrupt that such certificate and the consent of the creditors thereto were fairly obtained. The petitioning creditors were required to give bond conditioned on establishing their claims and the bankruptcy of the alleged bankrupt. The act was limited to seven years.

7 George I. c. 31, permitted proof of debts not due at the time of the bankruptcy, interest being deducted.

5 George II. c. 30, repeated, with some modifications, the provisions of 4 & 5 Anne, c. 17; 5 Anne, c. 22; 5 George I. c. 24, which had lapsed by the limitations in time which they contained. The choice of assignees was vested in the creditors having the majority in value, instead of in number as formerly. The act was passed for but three years, but was continued in force for varying periods by later statutes passed for the purpose, and was made perpetual by 37 George III. c. 124.

19 George II. c. 32, introduced another class of protected transactions. Payments made in the ordinary course of business by a bankrupt after an act of bankruptcy, but before the suing out of the commission to *bona fide* creditors without notice of any act of bankruptcy, were made valid and not recoverable by the assignees.

4 George III. c. 23, was passed to render members of Parliament (who were exempt from arrest) liable to bankruptcy for failure to pay or secure debts for two months after suit.

46 George III. c. 135, protected all *bona fide* dealings with a bankrupt made more than two months before the date of the commission, provided the person dealing with the bankrupt had no notice of any prior act of bankruptcy, or that he was insolvent or had stopped payment. Creditors whose claims accrued after an act of bankruptcy, but before the date of the commission, if they had no notice of the act of bankruptcy, were given the same rights as creditors whose claims accrued before the act of bankruptcy.

49 George III. c. 121, provided that consent of three-fifths instead of four-fifths in number and value of the creditors should suffice for the granting of the certificate.

Until 1824 the law of bankruptcy was to be collected from all the various statutes referred to above. No attempt had been made to codify or consolidate the various statutes. This was first done by

5 George IV. c. 98, and to remedy defects in this act, again the following year by 6 George IV. c. 16. The latter statute made the first approach to the allowance of voluntary bankruptcy proceedings. Until 4 & 5 Anne, c. 17, no one could have any object in having bankruptcy proceedings instituted against himself; but after discharges were allowed this was frequently desired, and to attain it an act of bankruptcy was sometimes purposely committed and proceedings instituted with the aid of friendly creditors. This was called a concerted act of bankruptcy, and had been treated as a fraud on the law; but was now authorized. This statute also made provision for the proof of contingent claims, and for deeds of arrangement by which an insolvent might with the consent of his creditors settle his affairs without becoming a bankrupt.

The law of bankruptcy had now, partly by the statutes enumerated and partly by judicial decision, been developed into nearly its modern form, though a voluntary petition by the bankrupt was not formally allowed until the next consolidated bankruptcy act, 12 & 13 Victoria, c. 106. There have been three later consolidated acts, 24 & 25 Victoria, c. 134; 32 & 33 Victoria, c. 71; and 46 & 47 Victoria, c. 52.

The first of these made non-traders for the first time subject to bankruptcy. The second narrowed the doctrine of reputed ownership, making it applicable only to traders, and applicable to no choses in action except debts due to the bankrupt in the course of his trade. A voluntary settlement by a trader within two years of bankruptcy was made void, and such a settlement made within ten years of bankruptcy was made void unless the parties claiming under the settlement could show that the settlor was solvent at the time he made it. This provision has been extended by 46 & 47 Victoria, c. 52, commonly called the Bankruptcy Act of 1883, to settlements by any bankrupt. The Act of 1883 was amended in 1890 by 53 & 54 Victoria, c. 71, which makes elaborate provision in regard to the debtor's discharge (section 8). Various requirements had been made by successive previous statutes, some more favorable to the debtor, others to the creditor. By the Act of 1890 no assent of creditors is necessary, but the court has power not only to refuse a discharge, but to suspend it for a fixed time, or until a dividend of not less than ten shillings in the pound has been paid to the creditors, or to require, as a condition of the discharge, the bankrupt's consent to judgment against himself in favor of the official receiver or trustee for the unpaid balance of his debts, or any part of it.

THE UNITED STATES.

Four bankruptcy acts have been enacted by the United States, the Act of April 4, 1800 (2 Stat. 19), repealed December 19, 1808 (2 Stat. 248); the Act of August 19, 1841 (5 Stat. 440), repealed March 3, 1843 (5 Stat. 614); the Act of March 2, 1867 (14 Stat. 517),

amended in some details by several acts,¹ especially by Act of June 22, 1874 (18 Stat. 178), and consolidated with the amendments in Rev. Stat. §§ 4972-5132, repealed June 7, 1878 (20 Stat. 99); the Act of July 1, 1898 (30 Stat. 544).

The Act of 1800 followed closely the model of the existing English bankruptcy laws. It applied to traders only; the acts of bankruptcy specified included not only acts by which a debtor deprived his creditors of remedies against his person or property, but also failure to give security for debts on which he had been arrested or his property attached. The act of bankruptcy relied on must have been committed within six months before the petition. Voluntary bankruptcy was not allowed. Commissioners were appointed by the District Court on the petition of a single creditor or firm having a claim of one thousand dollars, by two creditors having aggregate claims of fifteen hundred dollars, or by more than two creditors having aggregate claims of two thousand dollars. A bond was required from petitioning creditors. A temporary assignee might be appointed by the court, and a permanent assignee was chosen by the majority in value of the creditors. The assignment by the commissioners to the assignee conveyed by relation the bankrupt's estate as of the time of the commission of the act of bankruptcy, but a *bona fide* purchase made without notice of any act of bankruptcy before the issuing of the commission was protected. Property acquired by the bankrupt after the bankruptcy and before discharge passed to the assignee, as did property of which the bankrupt was the reputed owner. Debts due at a future day were made provable, and mutual debts were allowed to be set off against each other. A bankrupt was given an allowance and a discharge from his provable debts on conforming to the requirements of the act, and receiving a certificate to that effect signed by the commissioners and two-thirds in number and value of the creditors who had proved claims in excess of fifty dollars respectively.

The Act of 1841 departed widely from the previous law and from the English precedents, being much more favorable to debtors. It united a system of voluntary bankruptcy applicable to all persons owing debts not created by defalcation with a system of involuntary bankruptcy applicable to traders only. The acts of bankruptcy specified by the act included only certain acts by a debtor which tended to deprive a creditor wrongfully of his rights or remedies against his debtor's person or property. A trader might be insolvent and fail to pay his debts to any extent without being liable to bankruptcy. Preferences which had not been mentioned in the Act of 1800, nor in the early English acts (though the courts had to some extent supplied the omission), were

¹ July 27, 1868 (15 Stat. 227); June 30, 1870 (16 Stat. 173); July 14, 1870 (16 Stat. 276); June 8, 1872 (17 Stat. 334); Feb. 13, 1873 (17 Stat. 436); March 3, 1873 (17 Stat. 577); June 22, 1874 (18 Stat. 178). After the Revised Statutes were issued the law was further amended by Acts of April 14, 1876 (19 Stat. 33); July 26, 1876 (19 Stat. 102).

forbidden and made voidable by the assignee, and were also made ground for refusing a debtor's discharge, but they were not acts of bankruptcy. The bankrupt's property passed to the assignee from the time of the decree adjudicating the debtor a bankrupt, not from the time of the act of bankruptcy, as in the English law and in the first United States act. Property acquired by the bankrupt after the date of the decree did not pass, — a striking change from previous laws, English and American. Sureties, indorsers, and other holders of contingent claims, as well as creditors whose claims were not yet due, were given a right to prove. A debtor who had not been guilty of any of the wrongful acts forbidden by the act was entitled to a certificate of discharge, unless a majority in number and value of creditors who had proved their debts filed a written dissent.

The Acts of 1867 and of 1898 are printed in full hereafter.

In the long intervals during which there was no national bankruptcy act in force, most of the States made provision for some sort of bankruptcy or insolvency proceedings. The State legislation in force at the time of the passage of the national act of 1898 may be briefly summarized as follows: —

1. Some States had what may be called a real bankrupt law; that is, provision was made for involuntary as well as voluntary distribution of a debtor's property, and a discharge from all provable debts was granted. These States are California, Connecticut, Georgia, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, North Dakota, Rhode Island.

2. In the other States the insolvency laws were in general merely regulations and changes of more or less importance of the law of assignments in trust for creditors. In Kentucky, New Mexico, Tennessee, and Wisconsin a preference by an insolvent debtor operated itself as an assignment or afforded ground for the appointment of a receiver. But with this exception no involuntary proceedings were provided for. A few States belonging to this class allowed a debtor making a voluntary assignment a discharge from all provable debts; namely, Colorado, Idaho, New York, Oregon, Washington, Wisconsin. Others allowed such a debtor a discharge from debts actually proved; namely, Arizona, Arkansas, Indian Territory, New Jersey, South Carolina, Texas (if creditors received 33½ per cent), Wyoming. A majority of the States of this class forbade assignments with preferences, but a considerable minority allowed them; namely, Arkansas, Georgia, Indian Territory, Mississippi, Montana, New York (only to the extent of one-third of the estate), North Carolina, Utah, Virginia. In many other States there was nothing to prevent a debtor from giving preferences when insolvent, and then making a general assignment of such property as remained.

7

PART I.
STATUTES.

ACT OF JULY 1, 1898, c. 541.

[30 Statutes at Large, 544.]

AN ACT TO ESTABLISH A UNIFORM SYSTEM OF BANKRUPTCY THROUGH-
OUT THE UNITED STATES.

*Be it enacted by the Senate and House of Representatives of the
United States of America in Congress assembled:*

CHAPTER I.

DEFINITIONS.

SECTION 1. MEANING OF WORDS AND PHRASES. — *a.* The words and phrases used in this Act, and in proceedings pursuant thereto shall, unless the same be inconsistent with the context, be construed as follows: (1) "A person against whom a petition has been filed" shall include a person who has filed a voluntary petition; (2) "adjudication" shall mean the date of the entry of a decree that the defendant, in a bankruptcy proceeding, is a bankrupt, or if such decree is appealed from, then the date when such decree is finally confirmed; (3) "appellate courts" shall include the circuit courts of appeals of the United States, the supreme courts of the Territories, and the Supreme Court of the United States; (4) "bankrupt" shall include a person against whom an involuntary petition or an application to set a composition aside or to revoke a discharge has been filed, or who has filed a voluntary petition, or who has been adjudged a bankrupt; (5) "clerk" shall mean the clerk of a court of bankruptcy; (6) "corporations" shall mean all bodies having any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized under laws making the capital subscribed alone responsible for the debts of the association; (7) "court" shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee; (8) "courts of bankruptcy" shall include the district courts of the United States and of the Territories, the supreme court of the District of Columbia, and the United States court of the Indian Territory, and of Alaska; (9) "creditor" shall include any one who owns a demand

or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; (10) "date of bankruptcy," or "time of bankruptcy," or "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed; (11) "debt" shall include any debt, demand, or claim provable in bankruptcy; (12) "discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this Act; (13) "document" shall include any book, deed, or instrument in writing; (14) "holiday" shall include Christmas, the Fourth of July, the Twenty-second of February, and any day appointed by the President of the United States or the Congress of the United States as a holiday or as a day of public fasting or thanksgiving; (15) a person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts; (16) "judge" shall mean a judge of a court of bankruptcy, not including the referee; (17) "oath" shall include affirmation; (18) "officer" shall include clerk, marshal, receiver, referee, and trustee, and the imposing of a duty upon or the forbidding of an act by any officer shall include his successor and any person authorized by law to perform the duties of such officer; (19) "persons" shall include corporations, except where otherwise specified, and officers, partnerships, and women, and when used with reference to the commission of acts which are herein forbidden shall include persons who are participants in the forbidden acts, and the agents, officers, and members of the board of directors or trustees, or other similar controlling bodies of corporations; (20) "petition" shall mean a paper filed in a court of bankruptcy or with a clerk or deputy clerk by a debtor praying for the benefits of this Act, or by creditors alleging the commission of an act of bankruptcy by a debtor therein named; (21) "referee" shall mean the referee who has jurisdiction of the case, or to whom the case has been referred, or any one acting in his stead; (22) "conceal" shall include secrete, falsify, and mutilate; (23) "secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this Act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt has such security upon the bankrupt's assets; (24) "States" shall include the Territories, the Indian Territory, Alaska, and the District of Columbia; (25) "transfer" shall include the sale and every other and different mode of disposing of or parting with property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security; (26) "trustee" shall include all of the trustees of an estate; (27) "wage-earner" shall mean an individual who works for wages, salary, or hire, at a rate of compensation not exceeding one

thousand five hundred dollars per year ; (28) words importing the masculine gender may be applied to and include corporations, partnerships, and women ; (29) words importing the plural number may be applied to and mean only a single person or thing ; (30) words importing the singular number may be applied to and mean several persons or things.

CHAPTER II.

CREATION OF COURTS OF BANKRUPTCY AND THEIR JURISDICTION.

SECT. 2. That the courts of bankruptcy as hereinbefore defined, viz., the district courts of the United States in the several States, the supreme court of the District of Columbia, the district courts of the several Territories, and the United States courts in the Indian Territory and the District of Alaska, are hereby made courts of bankruptcy, and are hereby invested, within their respective territorial limits as now established, or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers and during their respective terms, as they are now or may be hereafter held, to (1) adjudge persons bankrupt who have had their principal place of business, resided or had their domicile within their respective territorial jurisdictions for the preceding six months, or the greater portion thereof, or who do not have their principal place of business, reside or have their domicile within the United States, but have property within their jurisdictions, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdiction ; (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates ; (3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified ; (4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies, of corporations, for violations of this Act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States ; (5) authorize the business of bankrupts to be conducted for limited periods by receivers, the marshals, or trustees, if necessary in the best interests of the estates ; (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy ; (7) cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided ;

(8) close estates, whenever it appears that they have been fully administered, by approving the final accounts and discharging the trustees, and reopen them whenever it appears they were closed before being fully administered; (9) confirm or reject compositions between debtors and their creditors, and set aside compositions and reinstate the cases; (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; (11) determine all claims of bankrupts to their exemptions; (12) discharge or refuse to discharge bankrupts and set aside discharges and reinstate the cases; (13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment; (14) extradite bankrupts from their respective districts to other districts; (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act; (16) punish persons for contempts committed before referees; (17) pursuant to the recommendation of creditors, or when they neglect to recommend the appointment of trustees, appoint trustees, and upon complaints of creditors, remove trustees for cause upon hearings and after notices to them; (18) tax costs, whenever they are allowed by law, and render judgments therefor against the unsuccessful party, or the successful party for cause, or in part against each of the parties, and against estates, in proceedings in bankruptcy; and (19) transfer cases to other courts of bankruptcy.

Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated.

CHAPTER III.

BANKRUPTS.

SECT. 3. ACTS OF BANKRUPTCY. — *a.* Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

b. A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the com-

mission of such act. Such time shall not expire until four months after (1) the date of the recording or registering of the transfer or assignment when the act consists in having made a transfer of any of his property with intent to hinder, delay, or defraud his creditors or for the purpose of giving a preference as hereinbefore provided, or a general assignment for the benefit of his creditors, if by law such recording or registering is required or permitted, or, if it is not, from the date when the beneficiary takes notorious, exclusive, or continuous possession of the property unless the petitioning creditors have received actual notice of such transfer or assignment.

c. It shall be a complete defence to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this Act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and under said subdivision one the burden of proving solvency shall be on the alleged bankrupt.

d. Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegation of his insolvency, it shall be his duty to appear in court on the hearing, with his books, papers, and accounts, and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him.

e. Whenever a petition is filed by any person for the purpose of having another adjudged a bankrupt, and an application is made to take charge of and hold the property of the alleged bankrupt or any part of the same, prior to the adjudication and pending a hearing on the petition, the petitioner or applicant shall file in the same court a bond, with at least two good and sufficient sureties, who shall reside within the jurisdiction of said court, to be approved by the court or a judge thereof, in such sum as the court shall direct, conditioned for the payment, in case such petition is dismissed, to the respondent, his or her personal representatives, all costs, expenses, and damages occasioned by such seizure, taking, and detention of the property of the alleged bankrupt.

If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses, and damages shall be fixed and allowed by the court, and paid by the obligors in such bond.

SECT. 4. WHO MAY BECOME BANKRUPTS. — a. Any person who owes debts, except a corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt.

b. Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated com-

pany, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this Act. Private bankers, but not national banks or banks incorporated under State or Territorial laws, may be adjudged involuntary bankrupts.

SECT. 5. PARTNERS. — *a.* A partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt.

b. The creditors of the partnership shall appoint the trustee; in other respects so far as possible the estate shall be administered as herein provided for other estates.

c. The court of bankruptcy which has jurisdiction of one of the partners may have jurisdiction of all the partners and of the administration of the partnership and individual property.

d. The trustees shall keep separate accounts of the partnership property and of the property belonging to the individual partners.

e. The expenses shall be paid from the partnership property and the individual property in such proportions as the court shall determine.

f. The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership.

g. The court may permit the proof of the claim of the partnership estate against the individual estates, and *vice versa*, and may marshal the assets of the partnership estate and individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates.

h. In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt.

SECT. 6. EXEMPTIONS OF BANKRUPTS. — *a.* This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.

SECT. 7. DUTIES OF BANKRUPTS. — *a.* The bankrupt shall (1) attend the first meeting of his creditors, if directed by the court or a judge thereof to do so, and the hearing upon his application for a discharge, if filed; (2) comply with all lawful orders of the court; (3) examine the correctness of all proofs of claims filed against his estate; (4) execute and deliver such papers as shall be ordered by the court; (5) execute to his trustee transfers of all his property in foreign countries; (6) immediately inform his trustee of any attempt, by his creditors or other persons, to evade the provisions of this Act coming to his knowledge; (7) in case of any person having to his knowledge proved a false claim against his estate, disclose that fact immediately to his trustee; (8) prepare, make oath to, and file in court within ten days, unless further time is granted, after the adjudication, if an involuntary bankrupt, and with the petition if a voluntary bankrupt, a schedule of his property, showing the amount and kind of property, the location thereof, its money value in detail, and a list of his creditors, showing their residences if known, if unknown, that fact to be stated, the amounts due each of them, the consideration thereof, the security held by them, if any, and a claim for such exemptions as he may be entitled to, all in triplicate, one copy of each for the clerk, one for the referee, and one for the trustee; and (9) when present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters which may affect the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.

Provided, however, That he shall not be required to attend a meeting of his creditors, or at or for an examination at a place more than one hundred and fifty miles distant from his home or principal place of business, or to examine claims except when presented to him, unless ordered by the court, or a judge thereof, for cause shown, and the bankrupt shall be paid his actual expenses from the estate when examined or required to attend at any place other than the city, town, or village of his residence.

SECT. 8. DEATH OR INSANITY OF BANKRUPTS. — *a.* The death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane: *Provided,* That in case of death the widow and children shall be entitled to all rights of dower and allowance fixed by the laws of the State of the bankrupt's residence.

SECT. 9. PROTECTION AND DETENTION OF BANKRUPTS. — *a.* A bankrupt shall be exempt from arrest upon civil process except in the following cases: (1) When issued from a court of bankruptcy for contempt or disobedience of its lawful orders; (2) when issued from a State

court having jurisdiction, and served within such State, upon a debt or claim from which his discharge in bankruptcy would not be a release, and in such case he shall be exempt from such arrest when in attendance upon a court of bankruptcy or engaged in the performance of a duty imposed by this Act.

b. The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto.

SECT. 10. EXTRADITION OF BANKRUPTS. — *a.* Whenever a warrant for the apprehension of a bankrupt shall have been issued, and he shall have been found within the jurisdiction of a court other than the one issuing the warrant, he may be extradited in the same manner in which persons under indictment are now extradited from one district within which a district court has jurisdiction to another.

SECT. 11. SUITS BY AND AGAINST BANKRUPTS. — *a.* A suit which is founded upon a claim for which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined.

b. The court may order the trustee to enter his appearance and defend any pending suit against the bankrupt.

c. A trustee may, with the approval of the court, be permitted to prosecute as trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

d. Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed.

SECT. 12. COMPOSITIONS, WHEN CONFIRMED. — *a.* A bankrupt may offer terms of composition to his creditors after, but not before, he has been examined in open court or at a meeting of his creditors and filed in court the schedule of his property and list of his creditors, required to be filed by bankrupts.

b. An application for the confirmation of a composition may be filed in the court of bankruptcy after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims, and the consideration to be paid by the bankrupt to his creditors, and the money necessary to pay all debts which have priority and the cost of the proceedings, have been deposited in such place as shall be designated by and subject to the order of the judge.

c. A date and place, with reference to the convenience of the parties in interest, shall be fixed for the hearing upon each application for the confirmation of a composition, and such objections as may be made to its confirmation.

d. The judge shall confirm a composition if satisfied that (1) it is for the best interests of the creditors; (2) the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge; and (3) the offer and its acceptance are in good faith and have not been made or procured except as herein provided, or by any means, promises, or acts herein forbidden.

e. Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided.

SECT. 13. COMPOSITIONS, WHEN SET ASIDE. — *a.* The judge may, upon the application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case if it shall be made to appear upon a trial that fraud was practised in the procuring of such composition, and that the knowledge thereof has come to the petitioners since the confirmation of such composition.

SECT. 14. DISCHARGES, WHEN GRANTED. — *a.* Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.

b. The judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has (1) committed an offence punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained.

c. The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge.

SECT. 15. DISCHARGES, WHEN REVOKED. — *a.* The judge may, upon the application of parties in interest who have not been guilty of undue laches, filed at any time within one year after a discharge shall have been granted, revoke it upon a trial if it shall be made to appear that it was obtained through the fraud of the bankrupt, and that the knowledge of the fraud has come to the petitioners since the granting of the discharge, and that the actual facts did not warrant the discharge.

SECT. 16. CO-DEBTORS OF BANKRUPTS. — *a.* The liability of a person who is co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt.

SECT. 17. DEBTS NOT AFFECTED BY A DISCHARGE. — *a.* A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, county, district, or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretences or false representations, or for wilful and malicious injuries to the person or property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity.

CHAPTER IV.

COURTS AND PROCEDURE THEREIN.

SECT. 18. PROCESS, PLEADINGS, AND ADJUDICATIONS. — *a.* Upon the filing of a petition for involuntary bankruptcy, service thereof, with a writ of subpoena, shall be made upon the person therein named as defendant in the same manner that service of such process is now had upon the commencement of a suit in equity in the courts of the United States, except that it shall be returnable within fifteen days, unless the judge shall for cause fix a longer time; but in case personal service cannot be made, then notice shall be given by publication in the same manner and for the same time as provided by law for notice by publication in suits in equity in courts of the United States.

b. The bankrupt, or any creditor, may appear and plead to the petition within ten days after the return day, or within such further time as the court may allow.

c. All pleadings setting up matters of fact shall be verified under oath.

d. If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury

trial is given by this Act, and make the adjudication or dismiss the petition.

e. If on the last day within which pleadings may be filed none are filed by the bankrupt or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

f. If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee.

g. Upon the filing of a voluntary petition the judge shall hear the petition and make the adjudication or dismiss the petition. If the judge is absent from the district, or the division of the district in which the petition is filed at the time of the filing, the clerk shall forthwith refer the case to the referee.

SECT. 19. JURY TRIALS. — *a.* A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his insolvency, except as herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

b. If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.

c. The right to submit matters in controversy, or an alleged offence under this Act, to a jury shall be determined and enjoyed, except as provided by this Act, according to the United States laws now in force or such as may be hereafter enacted in relation to trials by jury.

SECT. 20. OATHS, AFFIRMATIONS. — *a.* Oaths required by this Act, except upon hearings in court, may be administered by (1) referees; (2) officers authorized to administer oaths in proceedings before the courts of the United States, or under the laws of the State where the same are to be taken; and (3) diplomatic or consular officers of the United States in any foreign country.

b. Any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.

SECT. 21. EVIDENCE. — *a.* A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt, who is a competent witness

under the laws of the State in which the proceedings are pending, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act.

b. The right to take depositions in proceedings under this Act shall be determined and enjoyed according to the United States laws now in force, or such as may be hereafter enacted relating to the taking of depositions, except as herein provided.

c. Notice of the taking of depositions shall be filed with the referee in every case. When depositions are to be taken in opposition to the allowance of a claim notice shall also be served upon the claimant, and when in opposition to a discharge notice shall also be served upon the bankrupt.

d. Certified copies of proceedings before a referee, or of papers, when issued by the clerk or referee, shall be admitted as evidence with like force and effect as certified copies of the records of district courts of the United States are now or may hereafter be admitted as evidence.

e. A certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt, and if recorded shall impart the same notice that a deed from the bankrupt to the trustee if recorded would have imparted had not bankruptcy proceedings intervened.

f. A certified copy of an order confirming or setting aside a composition, or granting or setting aside a discharge, not revoked, shall be evidence of the jurisdiction of the court, the regularity of the proceedings, and of the fact that the order was made.

g. A certified copy of an order confirming a composition shall constitute evidence of the re-vesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart.

SECT. 22. REFERENCE OF CASES AFTER ADJUDICATION. — *a.* After a person has been adjudged a bankrupt, the judge may cause the trustee to proceed with the administration of the estate, or refer it (1) generally to the referee or specially with only limited authority to act in the premises or to consider and report upon specified issues; or (2) to any referee within the territorial jurisdiction of the court, if the convenience of parties in interest will be served thereby, or for cause, or if the bankrupt does not do business, reside, or have his domicile in the district.

b. The judge may, at any time, for the convenience of parties or for cause, transfer a case from one referee to another.

SECT. 23. JURISDICTION OF UNITED STATES AND STATE COURTS. — *a.* The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not

been instituted and such controversies had been between the bankrupts and such adverse claimants.

b. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.

c. The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offences enumerated in this act.

SECT. 24. JURISDICTION OF APPELLATE COURTS. — *a.* The Supreme Court of the United States, the circuit courts of appeals of the United States, and the supreme courts of the Territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any organized circuit of the United States and from the supreme court of the District of Columbia.

b. The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved.

SECT. 25. APPEALS AND WRITS OF ERROR. — *a.* That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme court of the Territories, in the following cases, to wit: (1) from a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of five hundred dollars or over. Such appeal shall be taken within ten days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

b. From any final decision of a court of appeals, allowing or rejecting a claim under this Act, an appeal may be had under such rules and within such time as may be prescribed by the Supreme Court of the United States, in the following cases and no other: —

1. Where the amount in controversy exceeds the sum of two thousand dollars, and the question involved is one which might have been taken on appeal or writ of error from the highest court of a State to the Supreme Court of the United States; or

2. Where some Justice of the Supreme Court of the United States shall certify that in his opinion the determination of the question or questions involved in the allowance or rejection of such claim is

essential to a uniform construction of this Act throughout the United States.

c. Trustees shall not be required to give bond when they take appeals or sue out writs of error.

d. Controversies may be certified to the Supreme Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted.

SECT. 26. **ARBITRATION OF CONTROVERSIES.** — *a.* The trustee may, pursuant to the direction of the court, submit to arbitration any controversy arising in the settlement of the estate.

b. Three arbitrators shall be chosen by mutual consent, or one by the trustee, one by the other party to the controversy, and the third by the two so chosen, or if they fail to agree in five days after their appointment the court shall appoint the third arbitrator.

c. The written finding of the arbitrators, or a majority of them, as to the issues presented, may be filed in court, and shall have like force and effect as the verdict of a jury.

SECT. 27. **COMPROMISES.** — *a.* The trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interests of the estate.

SECT. 28. **DESIGNATION OF NEWSPAPERS.** — *a.* Courts of bankruptcy shall by order designate a newspaper published within their respective territorial districts, and in the county in which the bankrupt resides or the major part of his property is situated, in which notices required to be published by this Act, and orders which the court may direct to be published, shall be inserted. Any court may in a particular case, for the convenience of parties in interest, designate some additional newspaper in which notices and orders in such case shall be published.

SECT. 29. **OFFENCES.** — *a.* A person shall be punished, by imprisonment for a period not to exceed five years, upon conviction of the offence of having knowingly and fraudulently appropriated to his own use, embezzled, spent, or unlawfully transferred any property or secreted or destroyed any document belonging to a bankrupt estate which came into his charge as trustee.

b. A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offence of having knowingly and fraudulently (1) concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy; or (2) made a false oath or account in, or in relation to, any proceeding in bankruptcy; (3) presented under oath any false claim for proof against the estate of a bankrupt, or used any such claim in composition personally or by agent, proxy, or attorney, or as agent, proxy, or attorney; or (4) received any material amount of property from a bankrupt after the filing of the petition, with intent to defeat

this Act; or (5) extorted or attempted to extort any money or property from any person as a consideration for acting or forbearing to act in bankruptcy proceedings.

c. A person shall be punished by fine, not to exceed five hundred dollars, and forfeit his office, and the same shall thereupon become vacant, upon conviction of the offence of having knowingly (1) acted as a referee in a case in which he is directly or indirectly interested; or (2) purchased, while a referee, directly or indirectly, any property of the estate in bankruptcy of which he is referee; or (3) refused, while a referee or trustee, to permit a reasonable opportunity for the inspection of the accounts relating to the affairs of, and the papers and records of, estates in his charge by parties in interest when directed by the court so to do.

d. A person shall not be prosecuted for any offence arising under this Act unless the indictment is found or the information is filed in court within one year after the commission of the offence.

SECT. 30. RULES, FORMS, AND ORDERS. — *a.* All necessary rules, forms, and orders as to procedure, and for carrying this Act into force and effect, shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States.

SECT. 31. COMPUTATION OF TIME. — *a.* Whenever time is enumerated by days in this Act, or in any proceeding in bankruptcy, the number of days shall be computed by excluding the first and including the last, unless the last fall on a Sunday or holiday, in which event the day last included shall be the next day thereafter which is not a Sunday or a legal holiday.

SECT. 32. TRANSFER OF CASES. — *a.* In the event petitions are filed against the same person, or against different members of a partnership, in different courts of bankruptcy, each of which has jurisdiction, the cases shall be transferred, by order of the courts relinquishing jurisdiction, to and be consolidated by the one of such courts which can proceed with the same for the greatest convenience of parties in interest.

CHAPTER V.

OFFICERS, THEIR DUTIES AND COMPENSATION.

SECT. 33. CREATION OF TWO OFFICES. — *a.* The offices of referee and trustee are hereby created.

SECT. 34. APPOINTMENT, REMOVAL, AND DISTRICTS OF REFEREES. — *a.* Courts of bankruptcy shall, within the territorial limits of which they respectively have jurisdiction, (1) appoint referees, each for a term of two years, and may, in their discretion, remove them because their services are not needed or for other cause; and (2) designate, and from time to time change, the limits of the districts of referees, so that each county, where the services of a referee are needed, may constitute at least one district.

SECT. 35. QUALIFICATIONS OF REFEREES. — *a.* Individuals shall not be eligible to appointment as referees unless they are respectively (1) competent to perform the duties of that office; (2) not holding any office of profit or emolument under the laws of the United States or of any State other than commissioners of deeds, justices of the peace, masters in chancery, or notaries public; (3) not related by consanguinity or affinity, within the third degree as determined by the common law, to any of the judges of the courts of bankruptcy or circuit courts of the United States, or of the justices or judges of the appellate courts of the districts wherein they may be appointed; and (4) residents of, or have their offices in, the territorial districts for which they are to be appointed.

SECT. 36. OATHS OF OFFICE OF REFEREES. — *a.* Referees shall take the same oath of office as that prescribed for judges of United States courts.

SECT. 37. NUMBER OF REFEREES. — *a.* Such number of referees shall be appointed as may be necessary to assist in expeditiously transacting the bankruptcy business pending in the various courts of bankruptcy.

SECT. 38. JURISDICTION OF REFEREES. — *a.* Referees respectively are hereby invested, subject always to a review by the judge, within the limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions; (2) exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them, except the power of commitment; (3) exercise the powers of the judge for the taking possession and releasing of the property of the bankrupt in the event of the issuance by the clerk of a certificate showing the absence of a judge from the judicial district, or the division of the district, or his sickness, or inability to act; (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this Act conferred on courts of bankruptcy and as shall be prescribed by rules or orders of the courts of bankruptcy of their respective districts, except as herein otherwise provided; and (5) upon the application of the trustee during the examination of the bankrupts, or other proceedings, authorize the employment of stenographers at the expense of the estates at a compensation not to exceed ten cents per folio for reporting and transcribing the proceedings.

SECT. 39. DUTIES OF REFEREES. — *a.* Referees shall (1) declare dividends and prepare and deliver to trustees dividend sheets showing the dividends declared and to whom payable; (2) examine all schedules of property and lists of creditors filed by bankrupts and cause such as are incomplete or defective to be amended; (3) furnish such information concerning the estates in process of administration before them as

may be requested by the parties in interest; (4) give notices to creditors as herein provided; (5) make up records embodying the evidence, or the substance thereof, as agreed upon by the parties in all contested matters arising before them, whenever requested to do so by either of the parties thereto, together with their findings therein, and transmit them to the judges; (6) prepare and file the schedules of property and lists of creditors required to be filed by the bankrupts, or cause the same to be done, when the bankrupts fail, refuse, or neglect to do so; (7) safely keep, perfect, and transmit to the clerks the records, herein required to be kept by them, when the cases are concluded; (8) transmit to the clerks such papers as may be on file before them whenever the same are needed in any proceedings in courts, and in like manner secure the return of such papers after they have been used, or, if it be impracticable to transmit the original papers, transmit certified copies thereof by mail; (9) upon application of any party in interest, preserve the evidence taken or the substance thereof as agreed upon by the parties before them when a stenographer is not in attendance; and (10) whenever their respective offices are in the same cities or towns where the courts of bankruptcy convene, call upon and receive from the clerks all papers filed in courts of bankruptcy which have been referred to them.

b. Referees shall not (1) act in cases in which they are directly or indirectly interested; (2) practise as attorneys and counsellors at law in any bankruptcy proceedings; or (3) purchase, directly or indirectly, any property of an estate in bankruptcy.

SECT. 40. COMPENSATION OF REFEREES. — *a.* Referees shall receive as full compensation for their services, payable after they are rendered, a fee of ten dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which have been administered before them one per centum commissions on sums to be paid as dividends and commissions, or one half of one per centum on the amount to be paid to creditors upon the confirmation of a composition.

b. Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

c. In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee.

SECT. 41. CONTEMPTS BEFORE REFEREES. — *a.* A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpoenaed, or, upon appearing, refuse to take the oath as a witness, or, after having taken the oath, refuse to be

examined according to law: *Provided*, That no person shall be required to attend as a witness before a referee at a place outside of the State of his residence, and more than one hundred miles from such place of residence, and only in case his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

b. The referee shall certify the facts to the judge, if any person shall do any of the things forbidden in this section. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of, and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before the court of bankruptcy, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of, or in the presence of, the court.

SECT. 42. RECORDS OF REFEREES. — a. The records of all proceedings in each case before a referee shall be kept as nearly as may be in the same manner as records are now kept in equity cases in circuit courts of the United States.

b. A record of the proceedings in each case shall be kept in a separate book or books, and shall, together with the papers on file, constitute the records of the case.

c. The book or books containing a record of the proceedings shall, when the case is concluded before the referee, be certified to by him, and, together with such papers as are on file before him, be transmitted to the court of bankruptcy and shall there remain as a part of the records of the court.

SECT. 43. REFEREE'S ABSENCE OR DISABILITY. — a. Whenever the office of a referee is vacant, or its occupant is absent or disqualified to act, the judge may act, or may appoint another referee, or another referee holding an appointment under the same court may, by order of the judge, temporarily fill the vacancy.

SECT. 44. APPOINTMENT OF TRUSTEES. — a. The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so.

SECT. 45. QUALIFICATIONS OF TRUSTEES. — a. Trustees may be (1) individuals who are respectively competent to perform the duties of that office, and reside or have an office in the judicial district within which they are appointed, or (2) corporations authorized by their charters or by law to act in such capacity and having an office in the judicial district within which they are appointed.

SECT. 46. DEATH OR REMOVAL OF TRUSTEES. — a. The death or removal of a trustee shall not abate any suit or proceeding which he is prosecuting or defending at the time of his death or removal, but the same may be proceeded with or defended by his joint trustee or suc-

cessor in the same manner as though the same had been commenced or was being defended by such joint trustee alone or by such successor.

SECT. 47. DUTIES OF TRUSTEES. — *a.* Trustees shall respectively (1) account for and pay over to the estates under their control all interest received by them upon property of such estates; (2) collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; (3) deposit all money received by them in one of the designated depositories; (4) disburse money only by check or draft on the depositories in which it has been deposited; (5) furnish such information concerning the estates of which they are the trustees and their administration as may be requested by parties in interest; (6) keep regular accounts showing all amounts received and from what sources and all amounts expended and on what accounts; (7) lay before the final meeting of the creditors detailed statements of the administration of the estates; (8) make final reports and file final accounts with the courts fifteen days before the days fixed for the final meetings of the creditors; (9) pay dividends within ten days after they are declared by the referees; (10) report to the courts, in writing, the condition of the estates and the amounts of money on hand, and such other details as may be required by the courts, within the first month after their appointment and every two months thereafter, unless otherwise ordered by the courts; and (11) set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

b. Whenever three trustees have been appointed for an estate, the concurrence of at least two of them shall be necessary to the validity of their every act concerning the administration of the estate.

SECT. 48. COMPENSATION OF TRUSTEES. — *a.* Trustees shall receive, as full compensation for their services, payable after they are rendered, a fee of five dollars deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and from estates which they have administered, such commissions on sums to be paid as dividends and commissions as may be allowed by the courts, not to exceed three per centum on the first five thousand dollars or less, two per centum on the second five thousand dollars or part thereof, and one per centum on such sums in excess of ten thousand dollars.

b. In the event of an estate being administered by three trustees instead of one trustee, or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

c. The court may, in its discretion, withhold all compensation from any trustee who has been removed for cause.

SECT. 49. ACCOUNTS AND PAPERS OF TRUSTEES. — *a.* The accounts and papers of trustees shall be open to the inspection of officers and all parties in interest.

SECT. 50. BONDS OF REFEREES AND TRUSTEES. — *a.* Referees, before assuming the duties of their offices, and within such time as the district courts of the United States having jurisdiction shall prescribe, shall respectively qualify by entering into bond to the United States in such sum as shall be fixed by such courts, not to exceed five thousand dollars, with such sureties as shall be approved by such courts, conditioned for the faithful performance of their official duties.

b. Trustees, before entering upon the performance of their official duties, and within ten days after their appointment, or within such further time, not to exceed five days, as the court may permit, shall respectively qualify by entering into bond to the United States, with such sureties as shall be approved by the courts, conditioned for the faithful performance of their official duties.

c. The creditors of a bankrupt estate, at their first meeting after the adjudication, or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, if there is a vacancy in the office of trustee, shall fix the amount of the bond of the trustee; they may at any time increase the amount of the bond. If the creditors do not fix the amount of the bond of the trustee as herein provided the court shall do so.

d. The court shall require evidence as to the actual value of the property of sureties.

e. There shall be at least two sureties upon each bond.

f. The actual value of the property of the sureties, over and above their liabilities and exemptions, on each bond shall equal at least the amount of such bond.

g. Corporations organized for the purpose of becoming sureties upon bonds, or authorized by law to do so, may be accepted as sureties upon the bonds of referees and trustees whenever the courts are satisfied that the rights of all parties in interest will be thereby amply protected.

h. Bonds of referees, trustees, and designated depositories shall be filed of record in the office of the clerk of the court and may be sued upon in the name of the United States, for the use of any person injured by a breach of their conditions.

i. Trustees shall not be liable, personally or on their bonds, to the United States, for any penalties or forfeitures incurred by the bankrupts under this Act, of whose estates they are respectively trustees.

j. Joint trustees may give joint or several bonds.

k. If any referee or trustee shall fail to give bond, as herein provided and within the time limited, he shall be deemed to have declined his appointment, and such failure shall create a vacancy in his office.

l. Suits upon referees' bonds shall not be brought subsequent to two years after the alleged breach of the bond.

m. Suits upon trustees' bonds shall not be brought subsequent to two years after the estate has been closed.

SECT. 51. DUTIES OF CLERKS. — *a.* Clerks shall respectively (1) account for, as for other fees received by them, the clerk's fee paid in each case and such other fees as may be received for certified copies of records which may be prepared for persons other than officers; (2) collect the fees of the clerk, referee and trustee in each case instituted before filing the petition, except the petition of a proposed voluntary bankrupt which is accompanied by an affidavit stating that the petitioner is without, and cannot obtain, the money with which to pay such fees; (3) deliver to the referees upon application all papers which may be referred to them, or, if the offices of such referees are not in the same cities or towns as the offices of such clerks, transmit such papers by mail, and in like manner return papers which were received from such referees after they have been used; (4) and within ten days after each case has been closed pay to the referee, if the case was referred, the fee collected for him, and to the trustee the fee collected for him at the time of filing the petition.

SECT. 52. COMPENSATION OF CLERKS AND MARSHALS. — *a.* Clerks shall respectively receive as full compensation for their service to each estate, a filing fee of ten dollars, except when a fee is not required from a voluntary bankrupt.

b. Marshals shall respectively receive from the estate where an adjudication in bankruptcy is made, except as herein otherwise provided, for the performance of their services in proceedings in bankruptcy, the same fees, and account for them in the same way, as they are entitled to receive for the performance of the same or similar services in other cases in accordance with laws now in force, or such as may be hereafter enacted, fixing the compensation of marshals.

SECT. 53. DUTIES OF ATTORNEY-GENERAL. — *a.* The Attorney-General shall annually lay before Congress statistical tables showing for the whole country, and by States, the number of cases during the year of voluntary and involuntary bankruptcy; the amount of the property of the estates; the dividends paid, and the expenses of administering such estates; and such other like information as he may deem important.

SECT. 54. STATISTICS OF BANKRUPTCY PROCEEDINGS. — *a.* Officers shall furnish in writing and transmit by mail such information as is within their knowledge, and as may be shown by the records and papers in their possession, to the Attorney-General, for statistical purposes, within ten days after being requested by him to do so.

CHAPTER VI.

CREDITORS.

SECT. 55. MEETINGS OF CREDITORS. — *a.* The court shall cause the first meeting of the creditors of a bankrupt to be held, not less than ten nor more than thirty days after the adjudication, at the county seat of the county in which the bankrupt has had his principal place of business, resided, or had his domicile; or if that place would be manifestly inconvenient as a place of meeting for the parties in interest, or if the bankrupt is one who does not do business, reside, or have his domicile within the United States, the court shall fix a place for the meeting which is the most convenient for parties in interest. If such meeting should by any mischance not be held within such time, the court shall fix the date, as soon as may be thereafter, when it shall be held.

b. At the first meeting of creditors the judge or referee shall preside, and, before proceeding with the other business, may allow or disallow the claims of creditors there presented, and may publicly examine the bankrupt or cause him to be examined at the instance of any creditor.

c. The creditors shall at each meeting take such steps as may be pertinent and necessary for the promotion of the best interests of the estate and the enforcement of this Act.

d. A meeting of creditors, subsequent to the first one, may be held at any time and place when all of the creditors who have secured the allowance of their claims sign a written consent to hold a meeting at such time and place.

e. The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect; if such request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request.

f. Whenever the affairs of the estate are ready to be closed a final meeting of creditors shall be ordered.

SECT. 56. VOTERS AT MEETING OF CREDITORS. — *a.* Creditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and are present, except as herein otherwise provided.

b. Creditors holding claims which are secured or have priority shall not, in respect to such claims, be entitled to vote at creditors' meetings, nor shall such claims be counted in computing either the number of creditors or the amount of their claims, unless the amounts of such

claims exceed the values of such securities or priorities, and then only for such excess.

SECT. 57. PROOF AND ALLOWANCE OF CLAIMS. — *a.* Proof of claims shall consist of a statement under oath, in writing, signed by a creditor setting forth the claim, the consideration therefor, and whether any, and, if so what, securities are held therefor, and whether any, and, if so what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor.

b. Whenever a claim is founded upon an instrument of writing, such instrument, unless lost or destroyed, shall be filed with the proof of claim. If such instrument is lost or destroyed, a statement of such fact and of the circumstances of such loss or destruction shall be filed under oath with the claim. After the claim is allowed or disallowed, such instrument may be withdrawn by permission of the court, upon leaving a copy thereof on file with the claim.

c. Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending or before the referee if the case has been referred.

d. Claims which have been duly proved shall be allowed, upon receipt by or upon presentation to the court, unless objection to their allowance shall be made by parties in interest, or their consideration be continued for cause by the court upon its own motion.

e. Claims of secured creditors and those which have priority may be allowed to enable such creditors to participate in the proceedings at creditors' meetings held prior to the determination of the value of their securities or priorities, but shall be allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities.

f. Objections to claims shall be heard and determined as soon as the convenience of the court and the best interests of the estates and the claimants will permit.

g. The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences.

h. The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance.

i. Whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor.

j. Debts owing to the United States, a State, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except

for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby, and such interest as may have accrued thereon according to law.

k. Claims which have been allowed may be reconsidered for cause and reallocated or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.

l. Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part.

m. The claim of any estate which is being administered in bankruptcy against any like estate may be proved by the trustee and allowed by the court in the same manner and upon like terms as the claims of other creditors.

n. Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment: "*Provided*, That the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer."

SECT. 58. NOTICES TO CREDITORS. — *a.* Creditors shall have at least ten days' notice by mail, to their respective addresses as they appear in the list of creditors of the bankrupt, or as afterwards filed with the papers in the case by the creditors, unless they waive notice in writing, of (1) all examinations of the bankrupt; (2) all hearings upon applications for the confirmation of compositions or the discharge of bankrupts; (3) all meetings of creditors; (4) all proposed sales of property; (5) the declaration and time of payment of dividends; (6) the filing of the final accounts of the trustee, and the time when and the place where they will be examined and passed upon; (7) the proposed compromise of any controversy; and (8) the proposed dismissal of the proceedings.

b. Notice to creditors of the first meeting shall be published at least once, and may be published such number of additional times as the court may direct; the last publication shall be at least one week prior to the date fixed for the meeting. Other notices may be published as the court shall direct.

c. All notices shall be given by the referee, unless otherwise ordered by the judge.

SECT. 59. WHO MAY FILE AND DISMISS PETITIONS. — *a.* Any qualified person may file a petition to be adjudged a voluntary bankrupt.

b. Three or more creditors who have provable claims against any person which amount in the aggregate, in excess of the value of securities held by them, if any, to five hundred dollars or over, or if all of

the creditors of such persons are less than twelve in number, then one of such creditors whose claim equals such amount may file a petition to have him adjudged a bankrupt.

c. Petitions shall be filed in duplicate, one copy for the clerk and one for service on the bankrupt.

d. If it be averred in the petition that the creditors of the bankrupt are less than twelve in number, and less than three creditors have joined as petitioners therein, and the answer avers the existence of a larger number of creditors, there shall be filed with the answer a list under oath of all the creditors, with their addresses, and thereupon the court shall cause all such creditors to be notified of the pendency of such petition and shall delay the hearing upon such petition for a reasonable time, to the end that parties in interest shall have an opportunity to be heard; if upon such hearing it shall appear that a sufficient number have joined in such petition, or if prior to or during such hearing a sufficient number shall join therein, the case may be proceeded with, but otherwise it shall be dismissed.

e. In computing the number of creditors of a bankrupt for the purpose of determining how many creditors must join in the petition, such creditors as were employed by him at the time of the filing of the petition, or are related to him by consanguinity or affinity within the third degree, as determined by the common law, and have not joined in the petition, shall not be counted.

f. Creditors other than original petitioners may at any time enter their appearance and join in the petition, or file an answer and be heard in opposition to the prayer of the petition.

g. A voluntary or involuntary petition shall not be dismissed by the petitioner or petitioners or for want of prosecution or by consent of parties until after notice to the creditors.

SECT. 60. PREFERRED CREDITORS. — a. A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

b. If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person.

c. If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy

may be set off against the amount which would otherwise be recoverable from him.

d. If a debtor shall directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counsellor at law, solicitor in equity, or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate.

CHAPTER VII.

ESTATES.

SECT. 61. DEPOSITORIES FOR MONEY. — *a.* Courts of bankruptcy shall designate, by order, banking institutions as depositories for the money of bankrupt estates, as convenient as may be to the residences of trustees, and shall require bonds to the United States, subject to their approval, to be given by such banking institutions, and may from time to time as occasion may require, by like order increase the number of depositories or the amount of any bond or change such depositories.

SECT. 62. EXPENSES OF ADMINISTERING ESTATES. — *a.* The actual and necessary expenses incurred by officers in the administration of estates shall, except where other provisions are made for their payment, be reported in detail, under oath, and examined and approved or disapproved by the court. If approved, they shall be paid or allowed out of the estates in which they were incurred.

SECT. 63. DEBTS WHICH MAY BE PROVED. — *a.* Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interests accrued after the filing of the petition and up to the time of the entry of such judgments.

b. Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate.

SECT. 64. DEBTS WHICH HAVE PRIORITY. — *a.* The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

b. The debts to have priority, except as herein provided, and to be paid in full out of bankrupt estates, and the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) the filing fees paid by creditors in involuntary cases; (3) the cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow; (4) wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant; and (5) debts owing to any person who by the laws of the States or the United States is entitled to priority.

c. In the event of the confirmation of a composition being set aside, or a discharge revoked, the property acquired by the bankrupt in addition to his estate at the time the composition was confirmed or the adjudication was made, shall be applied to the payment in full of the claims of creditors for property sold to him on credit, in good faith, while such composition or discharge was in force, and the residue, if any, shall be applied to the payment of the debts which were owing at the time of the adjudication.

SECT. 65. DECLARATION AND PAYMENT OF DIVIDENDS. — *a.* Dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.

b. The first dividend shall be declared within thirty days after the adjudication, if the money of the estate in excess of the amount necessary to pay the debts which have priority and such claims as have not been, but probably will be, allowed equals five per centum or more of such allowed claims. Dividends subsequent to the first shall be declared upon like terms as the first and as often as the amount shall equal ten per centum or more and upon closing the estate. Dividends may be declared oftener and in smaller proportions if the judge shall so order.

c. The rights of creditors who have received dividends, or in whose favor final dividends have been declared, shall not be affected by the proof and allowance of claims subsequent to the date of such payment or declarations of dividends; but the creditors proving and securing the allowance of such claims shall be paid dividends equal in amount to those already received by the other creditors if the estate equals so much before such other creditors are paid any further dividends.

d. Whenever a person shall have been adjudged a bankrupt by a court without the United States and also by a court of bankruptcy, creditors residing within the United States shall first be paid a dividend equal to that received in the court without the United States by other creditors before creditors who have received a dividend in such courts shall be paid any amounts.

e. A claimant shall not be entitled to collect from a bankrupt estate any greater amount than shall accrue pursuant to the provisions of this Act.

SECT. 66. UNCLAIMED DIVIDENDS. — a. Dividends which remain unclaimed for six months after the final dividend has been declared shall be paid by the trustee into court.

b. Dividends remaining unclaimed for one year shall, under the direction of the court, be distributed to the creditors whose claims have been allowed but not paid in full, and after such claims have been paid in full the balance shall be paid to the bankrupt: *Provided*, That in case unclaimed dividends belong to minors such minors may have one year after arriving at majority to claim such dividends.

SECT. 67. LIENS. — a. Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

b. Whenever a creditor is prevented from enforcing his rights as against a lien created, or attempted to be created, by his debtor, who afterwards becomes a bankrupt, the trustee of the estate of such bankrupt shall be subrogated to and may enforce such rights of such creditor for the benefit of the estate.

c. A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this Act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be

subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened.

d. Liens given or accepted in good faith and not in contemplation of or in fraud upon this Act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this Act.

e. That all conveyances, transfers, assignments, or encumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this Act subsequent to the passage of this Act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors. And all conveyances, transfers, or encumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him, and while insolvent, which are held null and void as against the creditors of such debtor by the laws of the State, Territory, or District in which such property is situate, shall be deemed null and void under this Act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of the bankrupt.

f. That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry.

SECT. 68. SET-OFFS AND COUNTERCLAIMS. — *a.* In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

b. A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy.

SECT. 69. POSSESSION OF PROPERTY. — *a.* A judge may, upon satisfactory proof, by affidavit, that a bankrupt against whom an involuntary petition has been filed and is pending has committed an act of bankruptcy, or has neglected or is neglecting, or is about to so neglect his property that it has thereby deteriorated or is thereby deteriorating or is about thereby to deteriorate in value, issue a warrant to the marshal to seize and hold it subject to further orders. Before such warrant is issued the petitioners applying therefor shall enter into a bond in such an amount as the judge shall fix, with such sureties as he shall approve, conditioned to indemnify such bankrupt for such damages as he shall sustain in the event such seizure shall prove to have been wrongfully obtained. Such property shall be released, if such bankrupt shall give bond in a sum which shall be fixed by the judge, with such sureties as he shall approve, conditioned to turn over such property, or pay the value thereof in money to the trustee, in the event he is adjudged a bankrupt pursuant to such petition.

SECT. 70. TITLE TO PROPERTY. — *a.* The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: *Provided*, That when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets;

and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property.

b. All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than seventy-five per centum of its appraised value.

c. The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

d. Whenever a composition shall be set aside, or discharge revoked, the trustee shall, upon his appointment and qualification, be vested as herein provided with the title to all of the property of the bankrupt as of the date of the final decree setting aside the composition or revoking the discharge.

e. The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value.

f. Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revert in him.

EFFECT OF BANKRUPT ACT ON PROCEEDINGS UNDER STATE LAWS.—

a. This act shall go into full force and effect upon its passage: *Provided, however,* That no petition for voluntary bankruptcy shall be filed within one month of the passage thereof, and no petition for involuntary bankruptcy shall be filed within four months of the passage thereof.

b. Proceedings commenced under State insolvency laws before the passage of this Act shall not be affected by it.

Approved July 1, 1898.

ACT OF MARCH 2, 1867, c. 176.

[14 Statutes at Large, 517.]

AN ACT TO ESTABLISH A UNIFORM SYSTEM OF BANKRUPTCY THROUGH-
OUT THE UNITED STATES.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the several district courts of the United States be, and they hereby are, constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same according to the provisions of this act. The said courts shall be always open for the transaction of business under this act, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time, and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court. And the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; and to the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties and due distribution of the assets among all the creditors; and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy. The said courts shall have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the circuit courts now have in any suit pending therein in equity. Said courts may sit, for the transaction of business in bankruptcy, at any place in the district, of which place and the time of holding court they shall have given notice, as well as at the places designated by law for holding such courts.¹

SECT. 2. *And be it further enacted,* That the several circuit courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made, may, upon bill, peti-

¹ See Act of 1874, c. 390, § 2.

tion, or other proper process, of any party aggrieved, hear and determine the case in a court of equity. The powers and jurisdiction hereby granted may be exercised either by said court or by any justice thereof in term time or vacation. Said circuit courts shall also have concurrent jurisdiction with the district courts of the same district of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee; but no suit at law or in equity shall in any case be maintainable by or against such assignee, or by or against any person claiming an adverse interest, touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years from the time the cause of action accrued, for or against such assignee: *Provided*, That nothing herein contained shall revive a right of action barred at the time such assignee is appointed.¹

OF THE ADMINISTRATION OF THE LAW IN COURTS OF BANKRUPTCY.

SECT. 3. *And be it further enacted*, That it shall be the duty of the judges of the district courts of the United States, within and for the several districts, to appoint in each Congressional district in said districts, upon the nomination and recommendation of the Chief Justice of the Supreme Court of the United States, one or more registers in bankruptcy, to assist the judge of the district court in the performance of his duties under this act. No person shall be eligible to such appointment unless he be a counsellor of said court, or of some one of the courts of record of the State in which he resides. Before entering upon the duties of his office, every person so appointed a register in bankruptcy shall give a bond to the United States, with condition that he will faithfully discharge the duties of his office, in a sum not less than one thousand dollars, to be fixed by said court, with sureties satisfactory to said court, or to either of the said justices thereof; and he shall, in open court, take and subscribe the oath prescribed in the act entitled "An act to prescribe an oath of office, and for other purposes," approved July second, eighteen hundred and sixty-two, and also that he will not, during his continuance in office, be, directly or indirectly, interested in or benefited by the fees or emoluments arising from any suit or matter pending in bankruptcy, in either the district or circuit court in his district.

SECT. 4. *And be it further enacted*, That every register in bankruptcy, so appointed and qualified, shall have power, and it shall be his duty, to make adjudication of bankruptcy, to receive the surrender of any bankrupt, to administer oaths in all proceedings before him, to hold and preside at meetings of creditors, to take proof of debts, to make all computations of dividends, and all orders of distribution, and

¹ See Act of 1874, c. 390, § 3.

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¹ See Act of 1874, c. 390, § 3.

to furnish the assignee with a certified copy of such orders, and of the schedules of creditors and assets filed in each case, to audit and pass accounts of assignees, to grant protection, to pass the last examination of any bankrupt in cases whenever the assignee or a creditor do not oppose, and to sit in chambers and despatch there such part of the administrative business of the court and such uncontested matters as shall be defined in general rules and orders, or as the district judge shall in any particular matter direct; and he shall also make short memoranda of his proceedings in each case in which he shall act, in a docket to be kept by him for that purpose, and he shall forthwith, as the proceedings are taken, forward to the clerk of the district court a certified copy of said memoranda, which shall be entered by said clerk in the proper minute-book to be kept in his office, and any register of the court may act for any other register thereof: *Provided, however,* That nothing in this section contained shall empower a register to commit for contempt, or to hear a disputed adjudication, or any question of the allowance or suspension of an order of discharge; but in all matters where an issue of fact or of law is raised and contested by any party to the proceedings before him, it shall be his duty to cause the question or issue to be stated by the opposing parties in writing, and he shall adjourn the same into court for decision by the judge. No register shall be of counsel or attorney, either in or out of court, in any suit or matter pending in bankruptcy in either the circuit or district court of his district, nor in an appeal therefrom; nor shall he be executor, administrator, guardian, commissioner, appraiser, divider, or assignee of or upon any estate within the jurisdiction of either of said courts of bankruptcy, nor be interested in the fees or emoluments arising from either of said trusts. The fees of said registers, as established by this act, and by the general rules and orders required to be framed under it, shall be paid to them by the parties for whom the services may be rendered in the course of proceedings authorized by this act.

SECT. 5. *And be it further enacted,* That the judge of the district court may direct a register to attend at any place within the district for the purpose of hearing such voluntary applications under this act as may not be opposed, of attending any meeting of creditors, or receiving any proof of debts, and, generally, for the prosecution of any bankruptcy or other proceedings under this act; and the travelling and incidental expenses of such register, and of any clerk or other officer attending him, incurred in so acting, shall be set[tled] by said court in accordance with the rules prescribed under the tenth section of this act, and paid out of the assets of the estate in respect of which such register has so acted; or if there be no such assets, or if the assets shall be insufficient, then such expenses shall form a part of the costs in the case or cases in which the register shall have acted in such journey, to be apportioned by the judge, and such register, so acting, shall have and exercise all powers, except the power of commitment, vested in the

district court for the summoning and examination of persons or witnesses, and for requiring the production of books, papers, and documents: *Provided always*, That all depositions of persons and witnesses taken before said register, and all acts done by him, shall be reduced to writing, and be signed by him, and shall be filed in the clerk's office as part of the proceedings. Such register shall be subject to removal by the judge of the district court, and all vacancies occurring by such removal, or by resignation, change of residence, death, or disability, shall be promptly filled by other fit persons, unless said court shall deem the continuance of the particular office unnecessary.

SECT. 6. *And be it further enacted*, That any party shall, during the proceedings before a register, be at liberty to take the opinion of the district judge upon any point or matter arising in the course of such proceedings, or upon the result of such proceedings, which shall be stated by the register in the shape of a short certificate to the judge, who shall sign the same if he approve thereof; and such certificate, so signed, shall be binding on all the parties to the proceeding; but every such certificate may be discharged or varied by the judge at chambers or in open court. In any bankruptcy, or in any other proceedings within the jurisdiction of the court, under this act, the parties concerned, or submitting to such jurisdiction, may at any stage of the proceedings, by consent, state any question or questions in a special case for the opinion of the court, and the judgment of the court shall be final unless it be agreed and stated in such special case that either party may appeal, if, in such case, an appeal is allowed by this act. The parties may also, if they think fit, agree, that upon the question or questions raised by such special case being finally decided, a sum of money, fixed by the parties, or to be ascertained by the court, or in such manner as the court may direct, or any property, or the amount of any disputed debt or claim, shall be paid, delivered, or transferred by one of such parties to the other of them, either with or without costs.

SECT. 7. *And be it further enacted*, That parties and witnesses summoned before a register shall be bound to attend, in pursuance of such summons, at the place and time designated therein, and shall be entitled to protection, and be liable to process of contempt in like manner as parties and witnesses are now liable thereto in case of default in attendance under any writ of subpœna, and all persons wilfully and corruptly swearing or affirming falsely before a register shall be liable to all the penalties, punishments, and consequences of perjury. If any person examined before a register shall refuse or decline to answer, or to swear to or sign his examination when taken, the register shall refer the matter to the judge, who shall have power to order the person so acting to pay the costs thereby occasioned, if such person be compellable by law to answer such question or to sign such examination, and such person shall also be liable to be punished for contempt.

OF APPEALS AND PRACTICE.

SECT. 8. *And be it further enacted*, That appeals may be taken from the district to the circuit courts in all cases in equity, and writs of error may be allowed to said circuit courts from said district courts in cases at law under the jurisdiction created by this act, when the debt or damages claimed amount to more than five hundred dollars; and any supposed creditor, whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the decision of the district court to the circuit court from the same district; but no appeal shall be allowed in any case from the district to the circuit court unless it is claimed, and notice given thereof to the clerk of the district court, to be entered with the record of the proceedings, and also to the assignee or creditor, as the case may be, or to the defeated party in equity, within ten days after the entry of the decree or decision appealed from. The appeal shall be entered at the term of the circuit court which shall be first held within and for the district next after the expiration of ten days from the time of claiming the same. But if the appellant in writing waives his appeal before any decision thereon, proceedings may be had in the district court as if no appeal had been taken; and no appeal shall be allowed unless the appellant at the time of claiming the same shall give bond in man[ner] now required by law in cases of such appeals. No writ of error shall be allowed unless the party claiming it shall comply with the statutes regulating the granting of such writs.

SECT. 9. *And be it further enacted*, That in cases arising under this act no appeal or writ of error shall be allowed in any case from the circuit courts to the Supreme Court of the United States, unless the matter in dispute in such case shall exceed two thousand dollars.

SECT. 10. *And be it further enacted*, That the justices of the Supreme Court of the United States, subject to the provisions of this act, shall frame general orders for the following purposes:—

For regulating the practice and procedure of the district courts in bankruptcy, and the several forms of petitions, orders, and other proceedings to be used in said courts in all matters under this act;

For regulating the duties of the various officers of said courts;

For regulating the fees payable and the charges and costs to be allowed, except such as are established by this act or by law, with respect to all proceedings in bankruptcy before said courts, not exceeding the rate of fees now allowed by law for similar services in other proceedings;

For regulating the practice and procedure upon appeals;

For regulating the filing, custody, and inspection of records;

And generally for carrying the provisions of this act into effect.

After such general orders shall have been so framed, they or any of them may be rescinded or varied, and other general orders may be

framed in manner aforesaid; and all such general orders so framed shall from time to time be reported to Congress, with such suggestions as said justices may think proper.¹

VOLUNTARY BANKRUPTCY — COMMENCEMENT OF PROCEEDINGS.

SECT. 11. *And be it further enacted*, That if any person residing within the jurisdiction of the United States, owing debts provable under this act exceeding the amount of three hundred dollars, shall apply by petition addressed to the judge of the judicial district in which such debtor has resided or carried on business for the six months next immediately preceding the time of filing such petition, or for the longest period during such six months, setting forth his place of residence, his inability to pay all his debts in full, his willingness to surrender all his estate and effects for the benefit of his creditors, and his desire to obtain the benefit of this act; and shall annex to his petition a schedule, verified by oath before the court or before a register in bankruptcy, or before one of the commissioners of the circuit court of the United States, containing a full and true statement of all his debts, and, as far as possible, to whom due, with the place of residence of each creditor, if known to the debtor, and if not known the fact to be so stated, and the sum due to each creditor; also, the nature of each debt or demand, whether founded on written security, obligation, contract, or otherwise, and also the true cause and consideration of such indebtedness in each case, and the place where such indebtedness accrued, and a statement of any existing mortgage, pledge, lien, judgment, or collateral or other security given for the payment of the same; and shall also annex to his petition an accurate inventory, verified in like manner, of all his estate, both real and personal, assignable under this act, describing the same and stating where it is situated, and whether there are any, and if so, what encumbrances thereon, the filing of such petition shall be an act of bankruptcy, and such petitioner shall be adjudged a bankrupt: *Provided*, That all citizens of the United States petitioning to be declared bankrupt shall, on filing such petition, and before any proceedings thereon, take and subscribe an oath of allegiance and fidelity to the United States, which oath shall be filed and recorded with the proceedings in bankruptcy. And the judge of the district court, or, if there be no opposing party, any register of said court, to be designated by the judge, shall forthwith, if he be satisfied that the debts due from the petitioner exceed three hundred dollars, issue a warrant, to be signed by such judge or register, directed to the marshal of said district, authorizing him forthwith, as messenger, to publish notices in such newspapers as the warrant specifies; to serve written or printed notice, by mail or personally, on all creditors upon the schedule filed with the debtor's petition, or whose names may be given to him in addition by the debtor, and to give such personal or other

¹ See Act of 1874, c. 390, § 18.

notice to any persons concerned as the warrant specifies, which notice shall state:—

First. That a warrant in bankruptcy has been issued against the estate of the debtor.

Second. That the payment of any debts and the delivery of any property belonging to such debtor to him or for his use, and the transfer of any property by him, are forbidden by law.

Third. That a meeting of the creditors of the debtor, giving the names, residences, and amounts, so far as known, to prove their debts and choose one or more assignees of his estate, will be held at a court of bankruptcy, to be holden at a time and place designated in the warrant, not less than ten nor more than ninety days after the issuing of the same.¹

OF ASSIGNMENTS AND ASSIGNEES.

SECT. 12. *And be it further enacted*, That at the meeting held in pursuance of the notice, one of the registers of the court shall preside, and the messenger shall make return of the warrant and of his doings thereon; and if it appears that the notice to the creditors has not been given as required in the warrant, the meeting shall forthwith be adjourned, and a new notice given as required. If the debtor dies after the issuing of the warrant, the proceedings may be continued and concluded in like manner as if he had lived.

SECT. 13. *And be it further enacted*, That the creditors shall, at the first meeting held after due notice from the messenger, in presence of a register designated by the court, choose one or more assignees of the estate of the debtor; the choice to be made by the greater part in value and in number of the creditors who have proved their debts. If no choice is made by the creditors at said meeting, the judge, or if there be no opposing interest, the register, shall appoint one or more assignees. If an assignee, so chosen or appointed, fails within five days to express in writing his acceptance of the trust, the judge or register may fill the vacancy. All elections or appointments of assignees shall be subject to the approval of the judge; and when in his judgment it is for any cause needful or expedient, he may appoint additional assignees, or order a new election. The judge at any time may, and upon the request in writing of any creditor who has proved his claim shall, require the assignee to give good and sufficient bond to the United States, with a condition for the faithful performance and discharge of his duties; the bond shall be approved by the judge or register by his indorsement thereon, shall be filed with the record of the case, and inure to the benefit of all creditors proving their claims, and may be prosecuted in the name and for the benefit of any injured party. If the assignee fails to give the bond within such time as the judge orders, not exceeding ten days after notice to him of such order, the judge shall remove him and appoint another in his place.

¹ See Act of 1874, c. 390, § 5.

SECT. 14. *And be it further enacted*, That as soon as said assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real and personal, shall vest in said assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings: *Provided, however*, That there shall be excepted from the operation of the provisions of this section the necessary household and kitchen furniture, and such other articles and necessities of such bankrupt as the said assignees shall designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed in value, in any case, the sum of five hundred dollars; and also the wearing apparel of such bankrupt, and that of his wife and children, and the uniform, arms and equipments of any person who is or has been a soldier in the militia, or in the service of the United States; and such other property as now is, or hereafter shall be, exempted from attachment, or seizure, or levy on execution by the laws of the United States, and such other property not included in the foregoing exceptions as is exempted from levy and sale upon execution or other process or order of any court by the laws of the State in which the bankrupt has his domicile at the time of the commencement of the proceedings in bankruptcy, to an amount not exceeding that allowed by such State exemption laws in force in the year eighteen hundred and sixty-four: *Provided*, That the foregoing exception shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignees; and in no case shall the property hereby excepted pass to the assignees, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this act; and the determination of the assignee in the matter shall, on exception taken, be subject to the final decision of the said court; *And provided further*, That no mortgage of any vessel or of any other goods or chattels, made as security for any debt or debts, in good faith and for present considerations and otherwise valid, and duly recorded, pursuant to any statute of the United States, or of any State, shall be invalidated or affected hereby; and all the property conveyed by the bankrupt in fraud of his creditors; all rights in equity, choses in action, patents and patent rights and copyrights; all debts due him, or any person for his use, and all liens and securities therefor; and all his rights of action for property or estate, real or personal, and for any cause of action which the bankrupt had against any person arising from contract or from the unlawful taking or detention, or of injury to the property of the bankrupt, and all his rights of redeeming such property or estate,

may, under the direction of the court, submit any controversy arising in the settlement of demands against the estate, or of debts due to it, to the determination of arbitrators, to be chosen by him, and the other party to the controversy, and may, under such direction, compound and settle any such controversy, by agreement with the other party, as he thinks proper and most for the interest of the creditors.

SECT. 18. *And be it further enacted*, That the court, after due notice and hearing, may remove an assignee for any cause which, in the judgment of the court, renders such removal necessary or expedient. At a meeting called by order of the court in its discretion for the purpose, or which shall be called upon the application of a majority of the creditors in number and value, the creditors may, with consent of [the] court, remove any assignee by such a vote as is hereinbefore provided for the choice of assignee. An assignee may, with the consent of the judge, resign his trust and be discharged therefrom. Vacancies caused by death or otherwise in the office of assignee may be filled by appointment of the court, or at its discretion by an election by the creditors, in the manner hereinbefore provided, at a regular meeting, or at a meeting called for the purpose, with such notice thereof in writing to all known creditors, and by such person, as the court shall direct. The resignation or removal of an assignee shall in no way release him from performing all things requisite on his part for the proper closing up of his trust and the transmission thereof to his successors, nor shall it affect the liability of the principal or surety on the bond given by the assignee. When, by death or otherwise, the number of assignees is reduced, the estate of the debtor not lawfully disposed of shall vest in the remaining assignee or assignees, and the persons selected to fill vacancies, if any, with the same powers and duties relative thereto as if they were originally chosen. Any former assignee, his executors or administrators, upon request, and at the expense of the estate, shall make and execute to the new assignee all deeds, conveyances, and assurances, and do all other lawful acts requisite to enable him to recover and receive all the estate. And the court may make all orders which it may deem expedient to secure the proper fulfilment of the duties of any former assignee, and the rights and interests of all persons interested in the estate. No person who has received any preference contrary to the provisions of this act shall vote for or be eligible as assignee; but no title to property, real or personal, sold, transferred, or conveyed by an assignee, shall be affected or impaired by reason of his ineligibility. An assignee refusing or unreasonably neglecting to execute an instrument when lawfully required by the court, or disobeying a lawful order or decree of the court in the premises, may be punished as for a contempt of court.¹

¹ See Act of 1874, c. 390, § 4.

OF DEBTS AND PROOF OF CLAIMS.

SECT. 19. *And be it further enacted*, That all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt. All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest. If the bankrupt shall be bound as drawer, indorser, surety, bail, or guarantor upon any bill, bond, note, or any other specialty or contract, or for any debt of another person, and his liability shall not have become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability shall have become fixed, and before the final dividend shall have been declared. In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained. Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt, or any part thereof, in discharge of the whole, shall be entitled to prove such debt or to stand in the place of the creditor if he shall have proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced. And any person so liable for the bankrupt, and who has not paid the whole of said debt, but is still liable for the same or any part thereof, may, if the creditor shall fail or omit to prove such debt, prove the same either in the name of the creditor or otherwise, as may be provided by the rules, and subject to such regulations and limitations as may be established by such rules. Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods. If any bankrupt shall be liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate. No debts other than those above specified shall be proved or allowed against the estate.

SECT. 20. *And be it further enacted*, That in all cases of mutual debts or mutual credits between the parties, the account between them

with the like right, title, power, and authority to sell, manage, dispose of, sue for, and recover or defend the same, as the bankrupt might or could have had if no assignment had been made, shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee; and he may sue for and recover the said estate debts and effects, and may prosecute and defend all suits at law or in equity, pending at the time of the adjudication of bankruptcy, in which such bankrupt is a party in his own name, in the same manner and with the like effect as they might have been presented or defended by such bankrupt; and a copy, duly certified by the clerk of the court, under the seal thereof, of the assignment made by the judge or register, as the case may be, to him as assignee, shall be conclusive evidence of his title as such assignee to take, hold, sue for, and recover the property of the bankrupt, as hereinbefore mentioned; but no property held by the bankrupt in trust shall pass by such assignment. No person shall be entitled to maintain an action against an assignee in bankruptcy for anything done by him as such assignee, without previously giving him twenty days' notice of such action, specifying the cause thereof, to the end that such assignee may have an opportunity of tendering amends, should he see fit to do so. No person shall be entitled, as against the assignee, to withhold from him possession of any books of account of the bankrupt, or claim any lien thereon; and no suit in which the assignee is a party shall be abated by his death or removal from office; but the same may be prosecuted and defended by his successor, or by the surviving or remaining assignee, as the case may be. The assignee shall have authority, under the order and direction of the court, to redeem or discharge any mortgage or conditional contract, or pledge or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien or other encumbrances. The debtor shall also, at the request of the assignee and at the expense of the estate, make and execute any instruments, deeds, and writings which may be proper to enable the assignee to possess himself fully of all the assets of the bankrupt. The assignee shall immediately give notice of his appointment, by publication at least once a week for three successive weeks in such newspapers as shall for that purpose be designated by the court, due regard being had to their general circulation in the district or in that portion of the district in which the bankrupt and his creditors shall reside, and shall, within six months, cause the assignment to him to be recorded in every registry of deeds or other office within the United States where a conveyance of any lands owned by the bankrupt ought by law to be recorded; and the record of such assignment, or a duly certified copy thereof, shall be evidence thereof in all courts.¹

SECT. 15. *And be it further enacted*, That the assignee shall demand and receive, from any and all persons holding the same, all the estate

¹ See Act of 1868, c. 258, § 2; Act of 1872, c. 339; Act of 1873, c. 235.

assigned, or intended to be assigned, under the provisions of this act; and he shall sell all such unencumbered estate, real and personal, which comes to his hands, on such terms as he thinks most for the interest of the creditors; but upon petition of any person interested, and for cause shown, the court may make such order concerning the time, place, and manner of sale as will, in its opinion, prove to the interest of the creditors; and the assignee shall keep a regular account of all money received by him as assignee, to which every creditor shall, at reasonable times, have free resort.

SECT. 16. *And be it further enacted*, That the assignee shall have the like remedy to recover all said estate, debts and effects in his own name, as the debtor might have had if the decree in bankruptcy had not been rendered and no assignment had been made. If, at the time of the commencement of proceedings in bankruptcy, an action is pending in the name of the debtor for the recovery of a debt or other thing which might or ought to pass to the assignee by the assignment, the assignee shall, if he requires it, be admitted to prosecute the action in his own name, in like manner and with like effect as if it had been originally commenced by him. No suit pending in the name of the assignee shall be abated by his death or removal; but upon the motion of the surviving or remaining or new assignee, as the case may be, he shall be admitted to prosecute the suit in like manner and with like effect as if it had been originally commenced by him. In suits prosecuted by the assignee a certified copy of the assignment made to him by the judge or register shall be conclusive evidence of his authority to sue.

SECT. 17. *And be it further enacted*, That the assignee shall, as soon as may be after receiving any money belonging to the estate, deposit the same in some bank in his name as assignee, or otherwise keep it distinct and apart from all other money in his possession; and shall, as far as practicable, keep all goods and effects belonging to the estate separate and apart from all other goods in his possession, or designated by appropriate marks, so that they may be easily and clearly distinguished, and may not be exposed or liable to be taken as his property or for the payment of his debts. When it appears that the distribution of the estate may be delayed by litigation or other cause, the court may direct the temporary investment of the money belonging to such estate in securities to be approved by the judge or a register of said court, or may authorize the same to be deposited in any convenient bank upon such interest, not exceeding the legal rate, as the bank may contract with the assignee to pay thereon. He shall give written notice to all known creditors, by mail or otherwise, of all dividends, and such notice of meetings, after the first, as may be ordered by the court. He shall be allowed, and may retain out of money in his hands, all the necessary disbursements made by him in the discharge of his duty, and a reasonable compensation for his services, in the discretion of the court. He

may, under the direction of the court, submit any controversy arising in the settlement of demands against the estate, or of debts due to it, to the determination of arbitrators, to be chosen by him, and the other party to the controversy, and may, under such direction, compound and settle any such controversy, by agreement with the other party, as he thinks proper and most for the interest of the creditors.

SECT. 18. *And be it further enacted*, That the court, after due notice and hearing, may remove an assignee for any cause which, in the judgment of the court, renders such removal necessary or expedient. At a meeting called by order of the court in its discretion for the purpose, or which shall be called upon the application of a majority of the creditors in number and value, the creditors may, with consent of [the] court, remove any assignee by such a vote as is hereinbefore provided for the choice of assignee. An assignee may, with the consent of the judge, resign his trust and be discharged therefrom. Vacancies caused by death or otherwise in the office of assignee may be filled by appointment of the court, or at its discretion by an election by the creditors, in the manner hereinbefore provided, at a regular meeting, or at a meeting called for the purpose, with such notice thereof in writing to all known creditors, and by such person, as the court shall direct. The resignation or removal of an assignee shall in no way release him from performing all things requisite on his part for the proper closing up of his trust and the transmission thereof to his successors, nor shall it affect the liability of the principal or surety on the bond given by the assignee. When, by death or otherwise, the number of assignees is reduced, the estate of the debtor not lawfully disposed of shall vest in the remaining assignee or assignees, and the persons selected to fill vacancies, if any, with the same powers and duties relative thereto as if they were originally chosen. Any former assignee, his executors or administrators, upon request, and at the expense of the estate, shall make and execute to the new assignee all deeds, conveyances, and assurances, and do all other lawful acts requisite to enable him to recover and receive all the estate. And the court may make all orders which it may deem expedient to secure the proper fulfilment of the duties of any former assignee, and the rights and interests of all persons interested in the estate. No person who has received any preference contrary to the provisions of this act shall vote for or be eligible as assignee; but no title to property, real or personal, sold, transferred, or conveyed by an assignee, shall be affected or impaired by reason of his ineligibility. An assignee refusing or unreasonably neglecting to execute an instrument when lawfully required by the court, or disobeying a lawful order or decree of the court in the premises, may be punished as for a contempt of court.¹

¹ See Act of 1874, c. 390, § 4.

OF DEBTS AND PROOF OF CLAIMS.

SECT. 19. *And be it further enacted*, That all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the terms of the contract, may be proved against the estate of the bankrupt. All demands against the bankrupt for or on account of any goods or chattels wrongfully taken, converted, or withheld by him may be proved and allowed as debts to the amount of the value of the property so taken or withheld, with interest. If the bankrupt shall be bound as drawer, indorser, surety, bail, or guarantor upon any bill, bond, note, or any other specialty or contract, or for any debt of another person, and his liability shall not have become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability shall have become fixed, and before the final dividend shall have been declared. In all cases of contingent debts and contingent liabilities contracted by the bankrupt, and not herein otherwise provided for, the creditor may make claim therefor, and have his claim allowed, with the right to share in the dividends, if the contingency shall happen before the order for the final dividend; or he may at any time apply to the court to have the present value of the debt or liability ascertained and liquidated, which shall then be done in such manner as the court shall order, and he shall be allowed to prove for the amount so ascertained. Any person liable as bail, surety, guarantor, or otherwise for the bankrupt, who shall have paid the debt, or any part thereof, in discharge of the whole, shall be entitled to prove such debt or to stand in the place of the creditor if he shall have proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced. And any person so liable for the bankrupt, and who has not paid the whole of said debt, but is still liable for the same or any part thereof, may, if the creditor shall fail or omit to prove such debt, prove the same either in the name of the creditor or otherwise, as may be provided by the rules, and subject to such regulations and limitations as may be established by such rules. Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods. If any bankrupt shall be liable for unliquidated damages arising out of any contract or promise, or on account of any goods or chattels wrongfully taken, converted, or withheld, the court may cause such damages to be assessed in such mode as it may deem best, and the sum so assessed may be proved against the estate. No debts other than those above specified shall be proved or allowed against the estate.

SECT. 20. *And be it further enacted*, That in all cases of mutual debts or mutual credits between the parties, the account between them

shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate: *Provided*, That no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition. When a creditor has a mortgage or pledge of real or personal property of the bankrupt, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of the debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made in such manner as the court shall direct; or the creditor may release or convey his claim to the assignee upon such property, and be admitted to prove his whole debt. If the value of the property exceeds the sum for which it is so held as security, the assignee may release to the creditor the bankrupt's right of redemption therein on receiving such excess; or he may sell the property, subject to the claim of the creditor thereon; and in either case the assignee and creditor, respectively, shall execute all deeds and writings necessary or proper to consummate the transaction. If the property is not so sold or released and delivered up, the creditor shall not be allowed to prove any part of his debt.¹

SECT. 21. *And be it further enacted*, That no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action and suit against the bankrupt, and all proceedings already commenced or unsatisfied judgments already obtained thereon, shall be deemed to be discharged and surrendered thereby; and no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there be no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, and provided, also, that if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed as aforesaid. If any bankrupt shall, at the time of adjudication, be liable upon any bill of exchange, promissory note, or other obligation in respect of distinct contracts as a member of two or more firms carrying on separate and distinct trades, and having distinct estates to be wound up in bankruptcy, or as a sole trader and also [as] a member of a firm, the circumstance that such firms are in whole or in part composed of the same individuals, or that the sole contractor is also one of the joint contractors, shall not prevent proof and receipt of dividend in

¹ See Act of 1874, c. 390, § 6.

respect of such distinct contracts against the estates respectively liable upon such contracts.¹

SECT. 22. *And be it further enacted*, That all proofs of debts against the estate of the bankrupt, by or in behalf of creditors residing within the judicial district where the proceedings in bankruptcy are pending, shall be made before one of the registers of the court in said district, and by or in behalf of non-resident debtors before any register in bankruptcy in the judicial district where such creditors or either of them reside, or before any commissioner of the circuit court authorized to administer oaths in any district. To entitle a claimant against the estate of a bankrupt to have his demand allowed, it must be verified by a deposition in writing on oath or solemn affirmation before the proper register or commissioner setting forth the demand, the consideration thereof, whether any and what securities are held therefor, and whether any and what payments have been made thereon; that the sum claimed is justly due from the bankrupt to the claimant; that the claimant has not, nor has any other person, for his use, received any security or satisfaction whatever other than that by him set forth, that the claim was not procured for the purpose of influencing the proceedings under this act, and that no bargain or agreement, express or implied, has been made or entered into, by or on behalf of such creditor, to sell, transfer, or dispose of the said claim or any part thereof, against such bankrupt, or take or receive, directly or indirectly, any money, property, or consideration whatever, whereby the vote of such creditor for assignee, or any action on the part of such creditor, or any other person in the proceedings under this act, is or shall be in any way affected, influenced, or controlled, and no claim shall be allowed unless all the statements set forth in such deposition shall appear to be true. Such oath or solemn affirmation shall be made by the claimant, testifying of his own knowledge, unless he is absent from the United States or prevented by some other good cause from testifying, in which cases the demand may be verified in like manner by the attorney or authorized agent of the claimant testifying to the best of his knowledge, information, and belief, and setting forth his means of knowledge; or if in a foreign country, the oath of the creditor may be taken before any minister, consul, or vice-consul of the United States; and the court may, if it shall see fit, require or receive further pertinent evidence either for or against the admission of the claim. Corporations may verify their claims by the oath or solemn affirmation of their president, cashier, or treasurer. If the proof is satisfactory to the register or commissioner, it shall be signed by the deponent, and delivered or sent by mail to the assignee, who shall examine the same and compare it with the books and accounts of the bankrupt, and shall register, in a book to be kept by him for that purpose, the names of creditors who have proved their claims, in the order in which such proof is received,

¹ See Act of 1874, c. 390, § 7.

stating the time of receipt of such proof, and the amount and nature of the debts, which books shall be open to the inspection of all the creditors. The court may, on the application of the assignee, or of any creditor, or of the bankrupt, or without any application, examine upon oath the bankrupt, or any person tendering or who has made proof of claims, and may summon any person capable of giving evidence concerning such proof, or concerning the debt sought to be proved, and shall reject all claims not duly proved, or where the proof shows the claim to be founded in fraud, illegality, or mistake.¹

SECT. 23. *And be it further enacted*, That when a claim is presented for proof before the election of the assignee, and the judge entertains doubts of its validity or of the right of the creditor to prove it, and is of opinion that such validity or right ought to be investigated by the assignee, he may postpone the proof of the claim until the assignee is chosen. Any person who, after the approval of this act shall have accepted any preference, having reasonable cause to believe that the same was made or given by the debtor, contrary to any provision of this act, shall not prove the debt or claim on account of which the preference was made or given, nor shall he receive any dividend therefrom until he shall first have surrendered to the assignee all property, money, benefit, or advantage received by him under such preference. The court shall allow all debts duly proved, and shall cause a list thereof to be made and certified by one of the registers; and any creditor may act at all meetings by his duly constituted attorney the same as though personally present.

SECT. 24. *And be it further enacted*, That a supposed creditor who takes an appeal to the circuit court from the decision of the district court, rejecting his claim in whole or in part, shall, upon entering his appeal in the circuit court, file in the clerk's office thereof a statement in writing of his claim, setting forth the same, substantially, as in a declaration for the same cause of action at law, and the assignee shall plead or answer thereto in like manner, and like proceedings shall thereupon be had in the pleadings, trial, and determination of the cause, as in action at law commenced and prosecuted, in the usual manner, in the courts of the United States, except that no execution shall be awarded against the assignee for the amount of a debt found due to the creditor. The final judgment of the court shall be conclusive, and the list of debts shall, if necessary, be altered to conform thereto. The party prevailing in the suit shall be entitled to costs against the adverse party, to be taxed and recovered as in suits at law; if recovered against the assignee, they shall be allowed out of the estate. A bill of exchange, promissory note, or other instrument, used in evidence upon the proof of a claim, and left in court or deposited in the clerk's office, may be delivered, by the register or clerk having the custody thereof, to the person who used it, upon his filing a copy thereof, attested by the

¹ See Acts of 1868, c. 258, §§ 2, 3; 1874, c. 390, § 20.

clerk of the court, who shall indorse upon it the name of the party against whose estate it has been proved, and the date and amount of any dividend declared thereon.

OF PROPERTY PERISHABLE AND IN DISPUTE.

SECT. 25. *And be it further enacted,* That when it appears to the satisfaction of the court that the estate of the debtor, or any part thereof, is of a perishable nature, or liable to deteriorate in value, the court may order the same to be sold, in such manner as may be deemed most expedient, under the direction of the messenger or assignee, as the case may be, who shall hold the funds received in place of the estate disposed of; and whenever it appears to the satisfaction of the court that the title to any portion of an estate, real or personal, which has come into possession of the assignee, or which is claimed by him, is in dispute, the court may, upon the petition of the assignee, and after such notice to the claimant, his agent or attorney, as the court shall deem reasonable, order it to be sold, under the direction of the assignee, who shall hold the funds received in place of the estate disposed of; and the proceeds of the sale shall be considered the measure of the value of the property in any suit or controversy between the parties in any courts. But this provision shall not prevent the recovery of the property from the possession of the assignee by any proper action commenced at any time before the court orders the sale.

EXAMINATION OF BANKRUPTS.

SECT. 26. *And be it further enacted,* That the court may, on the application of the assignee in bankruptcy, or of any creditor, or without any application, at all times require the bankrupt, upon reasonable notice, to attend and submit to an examination, on oath, upon all matters relating to the disposal or condition of his property, to his trade and dealings with others, and his accounts concerning the same, to all debts due to or claimed from him, and to all other matters concerning his property and estate and the due settlement thereof according to law, which examination shall be in writing, and shall be signed by the bankrupt and filed with the other proceedings; and the court may, in like manner, require the attendance of any other person as a witness, and if such person shall fail to attend, on being summoned thereto, the court may compel his attendance by warrant directed to the marshal, commanding him to arrest such person and bring him forthwith before the court, or before a register in bankruptcy, for examination as such witness. If the bankrupt is imprisoned, absent, or disabled from attendance, the court may order him to be produced by the jailer, or any officer in whose custody he may be, or may direct the examination to be had, taken, and certified at such time and place and in such manner as the court may deem proper, and with like effect as if such examination had been had in court. The bankrupt shall at all times,

until his discharge, be subject to the order of the court, and shall, at the expense of the estate, execute all proper writings and instruments, and do and perform all acts required by the court touching the assigned property or estate, and to enable the assignee to demand, recover, and receive all the property and estate assigned, wherever situated; and for neglect or refusal to obey any order of the court, such bankrupt may be committed and punished as for a contempt of court. If the bankrupt is without the district, and unable to return and personally attend at any of the times or do any of the acts which may be specified or required pursuant to this section, and if it appears that such absence was not caused by wilful default, and if, as soon as may be after the removal of such impediment, he offers to attend and submit to the order of the court in all respects, he shall be permitted so to do, with like effect as if he had not been in default. He shall also be at liberty, from time to time, upon oath to amend and correct his schedule of creditors and property, so that the same shall conform to the facts. For good cause shown, the wife of any bankrupt may be required to attend before the court, to the end that she may be examined as a witness; and if such wife do not attend at the time and place specified in the order, the bankrupt shall not be entitled to a discharge unless he shall prove to the satisfaction of the court that he was unable to procure the attendance of his wife. No bankrupt shall be liable to arrest during the pendency of the proceedings in bankruptcy in any civil action, unless the same is founded on some debt or claim from which his discharge in bankruptcy would not release him.¹

OF THE DISTRIBUTION OF THE BANKRUPT'S ESTATE.

SECT. 27. *And be it further enacted*, That all creditors whose debts are duly proved and allowed shall be entitled to share in the bankrupt's property and estate pro rata, without any priority or preference whatever, except that wages due from him to any operative, or clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the adjudication of bankruptcy, shall be entitled to priority, and shall be first paid in full: *Provided*, That any debt proved by any person liable, as bail, surety, guarantor, or otherwise, for the bankrupt, shall not be paid to the person so proving the same until satisfactory evidence shall be produced of the payment of such debt by such person so liable, and the share to which such debt would be entitled may be paid into court, or otherwise held for the benefit of the party entitled thereto, as the court may direct. At the expiration of three months from the date of the adjudication of bankruptcy in any case, or as much earlier as the court may direct, the court, upon request of the assignee, shall call a general meeting of the creditors, of which due notice shall be given, and the

¹ See Act of 1874, c. 390, § 8.

assignee shall then report, and exhibit to the court and to the creditors just and true accounts of all his receipts and payments, verified by his oath, and he shall also produce and file vouchers for all payments for which vouchers shall be required by any rule of the court; he shall also submit the schedule of the bankrupt's creditors and property as amended, duly verified by the bankrupt, and a statement of the whole estate of the bankrupt as then ascertained, of the property recovered and of the property outstanding, specifying the cause of its being outstanding, also what debts or claims are yet undetermined, and stating what sum remains in his hands. At such meeting the majority in value of the creditors present shall determine whether any and what part of the net proceeds of the estate, after deducting and retaining a sum sufficient to provide for all undetermined claims which, by reason of the distant residence of the creditor, or for other sufficient reason, have not been proved, and for other expenses and contingencies, shall be divided among the creditors; but unless at least one half in value of the creditors shall attend such meeting, either in person or by attorney, it shall be the duty of the assignee so to determine. In case a dividend is ordered, the register shall, within ten days after such meeting, prepare a list of creditors entitled to dividend, and shall calculate and set opposite to the name of each creditor who has proved his claim the dividend to which he is entitled out of the net proceeds of the estate set apart for dividend, and shall forward by mail to every creditor a statement of the dividend to which he is entitled, and such creditor shall be paid by the assignee in such manner as the court may direct.

SECT. 28. *And be it further enacted,* That the like proceedings shall be had at the expiration of the next three months, or earlier, if practicable, and a third meeting of creditors shall then be called by the court, and a final dividend then declared, unless any action at law or suit in equity be pending, or unless some other estate or effects of the debtor afterwards come to the hands of the assignee, in which case the assignee shall, as soon as may be, convert such estate or effects into money, and within two months after the same shall be so converted, the same shall be divided in manner aforesaid. Further dividends shall be made in like manner as often as occasion requires; and after the third meeting of creditors no further meeting shall be called, unless ordered by the court. If at any time there shall be in the hands of the assignee any outstanding debts or other property, due or belonging to the estate, which cannot be collected and received by the assignee without unreasonable or inconvenient delay or expense, the assignee may, under the direction of the court, sell and assign such debts or other property in such manner as the court shall order. No dividend already declared shall be disturbed by reason of debts being subsequently proved, but the creditors proving such debts shall be entitled to a dividend equal to those already received by the other creditors before any further payment is made to the latter. Preparatory to the final dividend, the assignee shall submit his account to the court and

file the same, and give notice to the creditors of such filing, and shall also give notice that he will apply for a settlement of his account, and for a discharge from all liability as assignee, at a time to be specified in such notice, and at such time the court shall audit and pass the accounts of the assignee, and such assignee shall, if required by the court, be examined as to the truth of such account, and if found correct he shall thereby be discharged from all liability as assignee to any creditor of the bankrupt. The court shall thereupon order a dividend of the estate and effects, or of such part thereof as it sees fit, among such of the creditors as have proved their claims, in proportion to the respective amount of their said debts. In addition to all expenses necessarily incurred by him in the execution of his trust, in any case, the assignee shall be entitled to an allowance for his services in such case on all moneys received and paid out by him therein, for any sum not exceeding one thousand dollars, five per centum thereon; for any larger sum, not exceeding five thousand dollars, two and a half per centum on the excess over one thousand dollars; and for any larger sum, one per centum on the excess over five thousand dollars, and if, at any time, there shall not be in his hands a sufficient amount of money to defray the necessary expenses required for the further execution of his trust, he shall not be obliged to proceed therein until the necessary funds are advanced or satisfactorily secured to him. If by accident, mistake, or other cause, without fault of the assignee, either or both of the said second and third meetings should not be held within the times limited, the court may, upon motion of an interested party, order such meetings, with like effect as to the validity of the proceedings as if the meeting had been duly held. In the order for a dividend, under this section, the following claims shall be entitled to priority or preference, and to be first paid in full in the following order:—

First. The fees, costs, and expenses of suits, and the several proceedings in bankruptcy under this act, and for the custody of property, as herein provided.

Second. All debts due to the United States, and all taxes and assessments under the laws thereof.

Third. All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws of such State.

Fourth. Wages due to any operative, clerk, or house servant, to an amount not exceeding fifty dollars, for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy.

Fifth. All debts due to any persons who, by the laws of the United States, are or may be entitled to a priority or preference, in like manner as if this act had not been passed: *Always provided*, That nothing contained in this act shall interfere with the assessment and collection of taxes by the authority of the United States or any State.

OF THE BANKRUPT'S DISCHARGE AND ITS EFFECT.

SECT. 29. *And be it further enacted*, That at any time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and within one year from the adjudication of bankruptcy, the bankrupt may apply to the court for a discharge from his debts, and the court shall thereupon order notice to be given by mail to all creditors who have proved their debts, and by publication at least once a week in such newspapers as the court shall designate, due regard being had to the general circulation of the same in the district, or in that portion of the district in which the bankrupt and his creditors shall reside, to appear on a day appointed for that purpose, and show cause why a discharge should not be granted to the bankrupt. No discharge shall be granted, or, if granted, be valid, if the bankrupt has wilfully sworn falsely in his affidavit annexed to his petition, schedule, or inventory, or upon any examination in the course of the proceedings in bankruptcy, in relation to any material fact concerning his estate or his debts, or to any other material fact; or if he has concealed any part of his estate or effects, or any books or writings relating thereto; or if he has been guilty of any fraud or negligence in the care, custody, or delivery to the assignee of the property belonging to him at the time of the presentation of his petition and inventory, excepting such property as he is permitted to retain under the provisions of this act, or if he has caused, permitted, or suffered any loss, waste, or destruction thereof; or if, within four months before the commencement of such proceedings, he has procured his lands, goods, money, or chattels to be attached, sequestered, or seized on execution; or if, since the passage of this act, he has destroyed, mutilated, altered, or falsified any of his books, documents, papers, writing, or securities, or has made or been privy to the making of any false or fraudulent entry in any book of account or other document, with intent to defraud his creditors; or has removed or caused to be removed any part of his property from the district, with intent to defraud his creditors; or if he has given any fraudulent preference contrary to the provisions of this act, or made any fraudulent payment, gift, transfer, conveyance, or assignment of any part of his property, or has lost any part thereof in gaming, or has admitted a false or fictitious debt against his estate; or if, having knowledge that any person has proved such false or fictitious debt, he has not disclosed the same to his assignee within one month after such knowledge; or if, being a merchant or tradesman, he has not, subsequently to the passage of this act, kept proper books of account; or if he, or any person in his behalf, has procured the assent of any creditor to the discharge, or influenced the action of any creditor at any stage of the proceedings, by any pecuniary consideration or obli-

gation; or if he has, in contemplation of becoming bankrupt, made any pledge, payment, transfer, assignment or conveyance of any part of his property, directly or indirectly, absolutely or conditionally, for the purpose of preferring any creditor or person having a claim against him, or who is or may be under liability for him, or for the purpose of preventing the property from coming into the hands of the assignee, or of being distributed under this act in satisfaction of his debts; or if he has been convicted of any misdemeanor under this act, or has been guilty of any fraud whatever contrary to the true intent of this act; and before any discharge is granted, the bankrupt shall take and subscribe an oath to the effect that he has not done, suffered, or been privy to any act, matter, or thing specified in this act as a ground for withholding such discharge, or as invalidating such discharge if granted.

SECT. 30. *And be it further enacted*, That no person who shall have been discharged under this act, and shall afterwards become bankrupt, on his own application shall be again entitled to a discharge whose estate is insufficient to pay seventy per centum of the debts proved against it, unless the assent in writing of three fourths in value of his creditors who have proved their claims is filed at or before the time of application for discharge; but a bankrupt who shall prove to the satisfaction of the court that he has paid all the debts owing by him at the time of any previous bankruptcy, or who has been voluntarily released therefrom by his creditors, shall be entitled to a discharge in the same manner and with the same effect as if he had not previously been bankrupt.

SECT. 31. *And be it further enacted*, That any creditor opposing the discharge of any bankrupt may file a specification in writing of the grounds of his opposition, and the court may in its discretion order any question of fact so presented to be tried at a stated session of the district court.

SECT. 32. *And be it further enacted*, That if it shall appear to the court that the bankrupt has in all things conformed to his duty under this act, and that he is entitled, under the provisions thereof, to receive a discharge, the court shall grant him a discharge from all his debts except as hereinafter provided, and shall give him a certificate thereof under the seal of the court, in substance as follows: —

DISTRICT COURT OF THE UNITED STATES, DISTRICT OF .

Whereas has been duly adjudged a bankrupt under the act of Congress establishing a uniform system of bankruptcy throughout the United States, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said be forever discharged from all debts and claims which by said act are made provable against his estate, and which existed on the day of , on which day the petition for adjudication was filed by (or

against) him ; excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy. Given under my hand and the seal of the court at _____, in the said district, this day of _____, A. D.

(Seal)

Judge.

SECT. 33. *And be it further enacted*, That no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act ; but the debt may be proved, and the dividend thereon shall be a payment on account of said debt ; and no discharge granted under this act shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise. And in all proceedings in bankruptcy commenced after one year from the time this act shall go into operation, no discharge shall be granted to a debtor whose assets do not pay fifty per centum of the claims against his estate, unless the assent in writing of a majority in number and value of his creditors who have proved their claims is filed in the case at or before the time of application for discharge.¹

SECT. 34. *And be it further enacted*, That a discharge duly granted under this act shall, with the exceptions aforesaid, release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy, and may be pleaded, by a simple averment that on the day of its date such discharge was granted to him, setting the same forth in haec verba, as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands, and the certificate shall be conclusive evidence in favor of such bankrupt of the fact and [the] regularity of such discharge: *Always provided*, That any creditor or creditors of said bankrupt, whose debt was proved or provable against the estate in bankruptcy, who shall see fit to contest the validity of said discharge on the ground that it was fraudulently obtained, may, at any time within two years after the date thereof, apply to the court which granted it to set aside and annul the same. Said application shall be in writing, shall specify which, in particular, of the several acts mentioned in section twenty-nine it is intended to give evidence of against the bankrupt, setting forth the grounds of avoidance, and no evidence shall be admitted as to any other of the said acts ; but said application shall be subject to amendment at the discretion of the court. The court shall cause reasonable notice of said application to be given to said bankrupt, and order him to appear and answer the same, within such time as to the court shall seem fit and proper. If, upon the hearing of said parties, the court shall find that the fraudulent acts, or any of them, set forth as aforesaid by said creditor or creditors against the bankrupt, are proved, and that said creditor or creditors had no knowledge of the same until after the

¹ See Acts of 1868, c. 258, § 1 ; 1870, c. 262, § 1 ; 1874, c. 390, § 9.

granting of said discharge, judgment shall be given in favor of said creditor or creditors, and the discharge of said bankrupt shall be set aside and annulled. But if said court shall find that said fraudulent acts and all of them, set forth as aforesaid, are not proved, or that they were known to said creditor or creditors before the granting of said discharge, then judgment shall be rendered in favor of the bankrupt, and the validity of his discharge shall not be affected by said proceedings.

PREFERENCES AND FRAUDULENT CONVEYANCES DECLARED VOID.

SECT. 35. *And be it further enacted*, That if any person, being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, pledge, assignment, transfer, or conveyance, or to be benefited thereby, or by such attachment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, assignment, or conveyance is made in fraud of the provisions of this act, the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it, or so to be benefited; and if any person, being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of this act, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be prima facie evidence of fraud. And contract, covenant, or security made or given by a bankrupt or other person with, or in trust for, any creditor, for securing the payment of any money as a consideration for or with intent to induce the creditor to forbear opposing the application for discharge of the bankrupt, shall be void; and if any creditor shall obtain any sum of money or other goods, chattels, or security from any person as an inducement for forbearing to oppose, or consenting to such application for discharge, every creditor so offend-

ing shall forfeit all right to any share or dividend in the estate of the bankrupt, and shall also forfeit double the value or amount of such money, goods, chattels, or security so obtained to be recovered by the assignee for the benefit of the estate.¹

BANKRUPTCY OF PARTNERSHIPS AND CORPORATIONS.

SECT. 36. *And be it further enacted*, That where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken, excepting such parts thereof as are hereinbefore excepted; and all the creditors of the company, and the separate creditors of each partner, shall be allowed to prove their respective debts; and the assignee shall be chosen by the creditors of the company, and shall also keep separate accounts of the joint stock or property of the copartnership and of the separate estate of each member thereof; and after deducting out of the whole amount received by such assignee the whole of the expenses and disbursements, the net proceeds of the joint stock shall be appropriated to pay the creditors of the copartnership, and the net proceeds of the separate estate of each partner shall be appropriated to pay his separate creditors; and if there shall be any balance of the separate estate of any partner, after the payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors; and if there shall be any balance of the joint stock after payment of the joint debts, such balance shall be divided and appropriated to and among the separate estates of the several partners according to their respective right and interest therein, and as it would have been if the partnership had been dissolved without any bankruptcy; and the sum so appropriated to the separate estate of each partner shall be applied to the payment of his separate debts; and the certificate of discharge shall be granted or refused to each partner as the same would or ought to be if the proceedings had been against him alone under this act; and in all other respects the proceedings against partners shall be conducted in the like manner as if they had been commenced and prosecuted against one person alone. If such copartners reside in different districts, that court in which the petition is first filed shall retain exclusive jurisdiction over the case.

SECT. 37. *And be it further enacted*, That the provisions of this act shall apply to all moneyed business or commercial corporations and joint stock companies, and that upon the petition of any officer of any such corporation or company, duly authorized by a vote of a majority of the corporators at any legal meeting called for the purpose, or upon the petition of any creditor or creditors of such corporation or company,

¹ See Act of 1874, c. 390, §§ 10, 11.

made and presented in the manner hereinafter provided in respect to debtors, the like proceedings shall be had and taken as are hereinafter provided in the case of debtors ; and all the provisions of this act which apply to the debtor, or set forth his duties in regard to furnishing schedules and inventories, executing papers, submitting to examinations, disclosing, making over, secreting, concealing, conveying, assigning, or paying away his money or property, shall in like manner, and with like force, effect, and penalties, apply to each and every officer of such corporation or company, and the money and property thereof. All payments, conveyances, and assignments declared fraudulent and void by this act when made by a debtor, shall in like manner, and to the like extent, and with like remedies, be fraudulent and void when made by a corporation or company. No allowance or discharge shall be granted to any corporation or joint stock company, or to any person or officer or member thereof : *Provided*, That whenever any corporation by proceedings under this act shall be declared bankrupt, all its property and assets shall be distributed to the creditors of such corporation in the manner provided in this act in respect to natural persons.

OF DATES AND DEPOSITIONS.

SECT. 38. *And be it further enacted*, That the filing of a petition for adjudication in bankruptcy, either by a debtor in his own behalf, or by any creditor against a debtor, upon which an order may be issued by the court, or by a register in the manner provided in section four, shall be deemed and taken to be the commencement of proceedings in bankruptcy under this act ; the proceedings in all cases of bankruptcy shall be deemed matters of record, but the same shall not be required to be recorded at large, but shall be carefully filed, kept, and numbered in the office of the clerk of the court, and a docket only, or short memorandum thereof, kept in books to be provided for that purpose, which shall be open to public inspection. Copies of such records, duly certified under the seal of the court, shall in all cases be prima facie evidence of the facts therein stated. Evidence or examination in any of the proceedings under this act may be taken before the court, or a register in bankruptcy, viva voce or in writing, before a commissioner of the circuit court, or by affidavit, or on commission, and the court may direct a reference to a register in bankruptcy, or other suitable person, to take and certify such examination, and may compel the attendance of witnesses, the production of books and papers, and the giving of testimony in the same manner as in suits in equity in the circuit court.

INVOLUNTARY BANKRUPTCY.

SECT. 39. *And be it further enacted*, That any person residing and owing debts as aforesaid, who, after the passage of this act, shall depart from the State, district, or Territory of which he is an inhabitant, with intent to defraud his creditors, or, being absent, shall, with such

intent, remain absent; or shall conceal himself to avoid the service of legal process in any action for the recovery of a debt or demand provable under this act; or shall conceal or remove any of his property to avoid its being attached, taken, or sequestered on legal process; or shall make any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, either within the United States or elsewhere, with intent to delay, defraud, or hinder his creditors; or who has been arrested and held in custody under or by virtue of mesne process or execution, issued out of any court of any State, district, or Territory within which such debtor resides or has property founded upon a demand in its nature provable against a bankrupt's estate under this act, and for a sum exceeding one hundred dollars, and such process is remaining in force and not discharged by payment, or in any other manner provided by the law of such State, district, or Territory applicable thereto, for a period of seven days; or has been actually imprisoned for more than seven days in a civil action, founded on contract, for the sum of one hundred dollars or upwards; or who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, or give any warrant to confess judgment; or procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent, by such disposition of his property, to defeat or delay the operation of this act; or who, being a banker, merchant, or trader, has fraudulently stopped or suspended and not resumed payment of his commercial paper, within a period of fourteen days, shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt, on the petition of one or more of his creditors, the aggregate of whose debts provable under this act amount to at least two hundred and fifty dollars, provided such petition is brought within six months after the act of bankruptcy shall have been committed. And if such person shall be adjudged a bankrupt, the assignee may recover back the money or other property so paid, conveyed, sold, assigned, or transferred contrary to this act, provided the person receiving such payment or conveyance had reasonable cause to believe that a fraud on this act was intended, or that the debtor was insolvent, and such creditor shall not be allowed to prove his debt in bankruptcy.¹

SECT. 40. *And be it further enacted*, That upon the filing of the petition authorized by the next preceding section, if it shall appear that sufficient grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause, at a court of bankruptcy to be holden at a time to be specified in the order, not less than five days from the service thereof, why the prayer of the petition should not be granted; and may also, by its injunctions, restrain the

¹ See Acts of 1868, c. 258, § 2; 1870, c. 262, § 2; 1874, c. 390, § 12.

debtor, and any other person, in the mean time, from making any transfer or disposition of any part of the debtor's property not excepted by this act from the operation thereof and from any interference therewith; and if it shall appear that there is probable cause for believing that the debtor is about to leave the district, or to remove or conceal his goods and chattels or his evidence of property, or make any fraudulent conveyance or disposition thereof, the court may issue a warrant to the marshal of the district, commanding him to arrest the alleged [bankrupt] and him safely keep, unless he shall give bail to the satisfaction of the court for his appearance from time to time, as required by the court, until the decision of the court upon the petition or the further order of the court, and forthwith to take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court. A copy of the petition and of such order to show cause shall be served on such debtor by delivering the same to him personally, or leaving the same at his last or usual place of abode; or, if such debtor cannot be found, or his place of residence ascertained, service shall be made by publication in such manner as the judge may direct. No further proceedings, unless the debtor appear and consent thereto, shall be had until proof shall have been given, to the satisfaction of the court, of such service or publication; and if such proof be not given on the return day of such order, the proceedings shall be adjourned and an order made that the notice be forthwith so served or published.¹

SECT. 41. *And be it further enacted*, That on such return day or adjourned day, if the notice has been duly served or published, or shall be waived by the appearance and consent of the debtor, the court shall proceed summarily to hear the allegations of the petitioner and debtor, and may adjourn the proceedings from time to time, on good cause shown, and shall, if the debtor on the same day so demand in writing, order a trial by jury at the first term of the court at which a jury shall be in attendance, to ascertain the fact of such alleged bankruptcy; and if upon such hearing or trial, the debtor proves to the satisfaction of the court or of the jury, as the case may be, that the facts set forth in the petition are not true, or that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens were the sole ground of the proceeding, the proceedings shall be dismissed and the respondent shall recover costs.²

SECT. 42. *And be it further enacted*, That if the facts set forth in the petition are found to be true, or if default be made by the debtor to appear pursuant to the order, upon due proof of service thereof being made, the court shall adjudge the debtor to be a bankrupt, and, as such, subject to the provisions of this act, and shall forthwith issue a warrant to take possession of the estate of the debtor. The warrant shall be directed, and the property of the debtor shall be taken thereon, and shall be assigned and distributed in the same manner and with similar

¹ See Act of 1874, c. 390, § 13.

² See Act of 1874, c. 390, § 14.

proceedings to those hereinbefore provided for the taking possession, assignment, and distribution of the property of the debtor upon his own petition. The order of adjudication of bankruptcy shall require the bankrupt forthwith, or within such number of days, not exceeding five after the date of the order or notice thereof, as shall by the order be prescribed, to make and deliver, or transmit by mail, post-paid, to the messenger, a schedule of the creditors, and an inventory of his estate in the form and verified in the manner required of a petitioning debtor by section thirteen. If the debtor has failed to appear in person, or by attorney, a certified copy of the adjudication shall be forthwith served on him by delivery or publication in the manner hereinbefore provided for the service of the order to show cause; and if the bankrupt is absent or cannot be found, such schedule and inventory shall be prepared by the messenger and the assignee from the best information they can obtain. If the petitioning creditor shall not appear and proceed on the return day, or adjourned day, the court may, upon the petition of any other creditor, to the required amount, proceed to adjudicate on such petition, without requiring a new service or publication of notice to the debtor.¹

OF SUPERSEDING THE BANKRUPT PROCEEDINGS BY ARRANGEMENT.

SECT. 43. *And be it further enacted*, That if at the first meeting of creditors, or at any meeting of creditors to be specially called for that purpose, and of which previous notice shall have been given for such length of time and in such manner as the court may direct, three fourths in value of the creditors whose claims have been proved shall determine and resolve that it is for the interest of the general body of the creditors that the estate of the bankrupt should be wound up and settled, and distribution made among the creditors by trustees, under the inspection and direction of a committee of the creditors, it shall be lawful for the creditors to certify and report such resolution to the court, and to nominate one or more trustees to take and hold and distribute the estate, under the direction of such committee. If it shall appear to the court, after hearing the bankrupt and such creditors as may desire to be heard, that the resolution was duly passed, and that the interests of the creditors will be promoted thereby, it shall confirm the same; and upon the execution and filing, by or on behalf of three fourths in value of all the creditors whose claims have been proved, of a consent that the estate of the bankrupt be wound up and settled by said trustees according to the terms of such resolution, the bankrupt, or his assignee in bankruptcy, if appointed, as the case may be, shall, under the direction of the court, and under oath, convey, transfer, and deliver all the property and estate of the bankrupt to the said trustee or trustees, who shall, upon such conveyance and transfer, have and hold the same in the same manner, and with the same powers and rights, in all respects, as the bankrupt would have had or held the same

¹ See Act of 1868, c. 258, § 2.

if no proceedings in bankruptcy had been taken, or as the assignee in bankruptcy would have done had such resolution not been passed; and such consent and the proceedings thereunder shall be as binding in all respects on any creditor whose debt is provable, who has not signed the same, as if he had signed it, and on any creditor whose debt, if provable, is not proved, as if he had proved it; and the court, by order, shall direct all acts and things needful to be done to carry into effect such resolution of the creditors, and the said trustees shall proceed to wind up and settle the estate under the direction and inspection of such committee of the creditors, for the equal benefit of all such creditors, and the winding up and settlement of any estate under the provisions of this section shall be deemed to be proceedings in bankruptcy under this act; and the said trustees shall have all the rights and powers of assignees in bankruptcy. The court, on the application of such trustees, shall have power to summon and examine, or [on] oath or otherwise, the bankrupt and any creditor, and any person indebted to the estate, or known or suspected of having any of the estate in his possession, or any other person whose examination may be material or necessary to aid the trustees in the execution of their trust, and to compel the attendance of such persons and the production of books and papers in the same manner as in other proceedings in bankruptcy under this act; and the bankrupt shall have the right to apply for and obtain a discharge after the passage of such resolution and the appointment of such trustees as if such resolution had not been passed, and as if all the proceedings had continued in the manner provided in the preceding sections of this act. If the resolution shall not be duly reported, or the consent of the creditors shall not be duly filed, or if, upon its filing, the court shall not think fit to approve thereof, the bankruptcy shall proceed as though no resolution had been passed, and the court may make all necessary orders for resuming the proceedings. And the period of time which shall have elapsed between the date of the resolution and the date of the order for resuming proceedings shall not be reckoned in calculating periods of time prescribed by this act.¹

PENALTIES AGAINST BANKRUPTS.

SECT. 44. *And be it further enacted*, That from and after the passage of this act if any debtor or bankrupt shall, after the commencement of proceedings in bankruptcy, secrete or conceal any property belonging to his estate, or part with, conceal, or destroy, alter, mutilate, or falsify, or cause to be concealed, destroyed, altered, mutilated, or falsified, any book, deed, document, or writing relating thereto, or remove, or cause to be removed, the same or any part thereof out of the district, or otherwise dispose of any part thereof, with intent to prevent it from coming into the possession of the assignee in bankruptcy, or to hinder, impede, or delay either of them in recovering or receiving the same, or

¹ See Act of 1874, c. 390, § 17.

make any payment, gift, sale, assignment, transfer, or conveyance of any property belonging to his estate with the like intent, or spend any part thereof in gaming; or shall, with intent to defraud, wilfully and fraudulently conceal from his assignee or omit from his schedule any property or effects whatsoever; or if, in case of any person having, to his knowledge or belief, proved a false or fictitious debt against his estate, he shall fail to disclose the same to his assignee within one month after coming to the knowledge or belief thereof; or shall attempt to account for any of his property by fictitious losses or expenses; or shall, within three months before the commencement of proceedings in bankruptcy, under the false color and pretence of carrying on business and dealing in the ordinary course of trade, obtain on credit from any person any goods or chattels with intent to defraud; or shall, with intent to defraud his creditors, within three months next before the commencement of proceedings in bankruptcy, pawn, pledge, or dispose of, otherwise than by bona fide transactions in the ordinary way of his trade, any of his goods or chattels which have been obtained on credit and remain unpaid for, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any court of the United States, shall be punished by imprisonment, with or without hard labor, for a term not exceeding three years.¹

PENALTIES AGAINST OFFICERS.

SECT. 45. *And be it further enacted*, That if any judge, register, clerk, marshal, messenger, assignee, or any other official of the several courts of bankruptcy shall, for anything done or pretended to be done under this act, or under color of doing anything thereunder, wilfully demand or take, or appoint or allow any person whatever to take for him or on his account, or for or on account of any other person, or in trust for him or for any other person, any fee, emolument, gratuity, sum of money, or anything of value whatever, other than is allowed by this act, or which shall be allowed under the authority thereof, such person, when convicted thereof, shall forfeit and pay the sum of not less than three hundred dollars, and not exceeding five hundred dollars, and be imprisoned not exceeding three years.

SECT. 46. *And be it further enacted*, That if any person shall forge the signature of a judge, register, or other officer of the court, or shall forge or counterfeit the seal of the courts, or knowingly concur in using any such forged or counterfeit signature or seal for the purpose of authenticating any proceeding or document, or shall tender in evidence any such proceeding or document with a false or counterfeit signature of any such judge, register, or other officer, or a false or counterfeit seal of the court, subscribed or attached thereto, knowing such signature or seal to be false or counterfeit, any such person shall be guilty of felony, and upon conviction thereof shall be liable to a fine of not

¹ See Act of 1868, c. 258, § 2.

less than five hundred dollars, and not more than five thousand dollars, and to be imprisoned not exceeding five years, at the discretion of the court.

FEES AND COSTS.

SECT. 47. *And be it further enacted*, That in each case there shall be allowed and paid, in addition to the fees of the clerk of the court as now established by law, or as may be established by general order, under the provisions of this act, for fees in bankruptcy, the following fees, which shall be applied to the payment for the services of the registers:—

For issuing every warrant, two dollars.

For each day in which a meeting is held, three dollars.

For each order for a dividend, three dollars.

For every order substituting an arrangement by trust deed for bankruptcy, two dollars.

For every bond with sureties, two dollars.

For every application for any meeting in any matter under this act, one dollar.

For every day's service while actually employed under a special order of the court, a sum not exceeding five dollars, to be allowed by the court.

For taking depositions, the fees now allowed by law.

For every discharge when there is no opposition, two dollars.

Such fees shall have priority of payment over all other claims out of the estate, and, before a warrant issues, the petitioner shall deposit with the senior register of the court, or with the clerk, to be delivered to the register, fifty dollars as security for the payment thereof; and if there are not sufficient assets for the payment of the fees, the person upon whose petition the warrant is issued, shall pay the same, and the court may issue an execution against him to compel payment to the register.

Before any dividend is ordered, the assignee shall pay out of the estate to the messenger the following fees, and no more:—

First. For service of warrant, two dollars.

Second. For all necessary travel, at the rate of five cents a mile each way.

Third. For each written note to creditor named in the schedule, ten cents.

Fourth. For custody of property, publication of notices, and other services, his actual and necessary expenses upon returning the same in specific items, and making oath that they have been actually incurred and paid by him, and are just and reasonable, the same to be taxed or adjusted by the court, and the oath of the messenger shall not be conclusive as to the necessity of said expenses.

For cause shown, and upon hearing thereon, such further allowance may be made as the court, in its discretion, may determine.

The enumeration of the foregoing fees shall not prevent the judges, who shall frame general rules and orders in accordance with the provisions of section ten, from prescribing a tariff of fees for all other services of the officers of courts of bankruptcy, or from reducing the fees prescribed in this section in classes of cases to be named in their rules and orders.¹

OF MEANING OF TERMS AND COMPUTATION OF TIME.

SECT. 48. *And be it further enacted*, That the word "assignee," and the word "creditor" shall include the plural also; and the word "messenger" shall include his assistant or assistants, except in the provision for the fees of that officer. The word "marshal" shall include the marshal's deputies; the word "person" shall also include "corporation"; and the word "oath" shall include "affirmation." And in all cases in which any particular number of days is prescribed by this act, or shall be mentioned in any rule or order of court or general order which shall at any time be made under this act, for the doing of any act, or for any other purpose, the same shall be reckoned, in the absence of any expression to the contrary, exclusive of the first, and inclusive of the last day, unless the last day shall fall on a Sunday, Christmas day, or on any day appointed by the President of the United States as a day of public fast or thanksgiving, or on the Fourth of July, in which case the time shall be reckoned exclusive of that day also.

SECT. 49. *And be it further enacted*, That all the jurisdiction, power, and authority conferred upon and vested in the District Court of the United States by this act in cases in bankruptcy are hereby conferred upon and vested in the Supreme Court of the District of Columbia, and in and upon the supreme courts of the several Territories of the United States, when the bankrupt resides in the said District of Columbia or in either of the said Territories. And in those judicial districts which are not within any organized circuit of the United States, the power and jurisdiction of a circuit court in bankruptcy may be exercised by the district judge.²

SECT. 50. *And be it further enacted*, That this act shall commence and take effect as to the appointment of the officers created hereby, and the promulgation of rules and general orders, from and after the date of its approval: *Provided*, That no petition or other proceeding under this act shall be filed, received, or commenced before the first day of June, anno Domini, eighteen hundred and sixty-seven.

Approved, March 2, 1867.

¹ See Act of 1868, c. 258, § 2.

² See Act of 1874, c. 390, § 16.

ACT OF JULY 27, 1868, c. 258.

[15 Statutes at Large, 227.]

AN ACT IN AMENDMENT OF AN ACT ENTITLED "AN ACT TO ESTABLISH A UNIFORM SYSTEM OF BANKRUPTCY THROUGHOUT THE UNITED STATES," APPROVED MARCH SECOND, EIGHTEEN HUNDRED AND SIXTY-SEVEN.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of second clause of the thirty-third section of said act shall not apply to the cases of proceedings in bankrupt[t]cy commenced prior to the first day of January, eighteen hundred and sixty-nine, and the time during which the operation of the provisions of said clause is postponed shall be extended until said first day of January, eighteen hundred and sixty-nine. And said clause is hereby so amended as to read as follows: In all proceedings in bankruptcy commenced after the first day of January, eighteen hundred and sixty-nine, no discharge shall be granted to a debtor whose assets shall not be equal to fifty per centum of the claims proved against his estate upon which he shall be liable as the principal debtor, unless the assent in writing of a majority in number and value of his creditors to whom he shall have become liable as principal debtor, and who shall have proved their claims, be filed in the case at or before the time of the hearing of the application for discharge.

SECT. 2. *And be it further enacted,* That said act be further amended as follows: The phrase "presented or defended," in the fourteenth section of said act shall read "prosecuted or defended"; the phrase non-resident debtors" in line five, section twenty-two, of the act as printed in the Statutes at Large, shall read "non-resident creditors"; that the word "or" in the next to the last line of the thirty-ninth section of the act shall read "and"; that the phrase "section thirteen" in the forty-second section of said act shall read "section eleven"; and the phrase "or spends any part thereof in gaming" in the forty-fourth section of said act shall read "or shall spend any part thereof in gaming"; and that the words "with the senior register, or" and the phrase "to be delivered to the register" in the forty-seventh section of said act to be stricken out.

SECT. 3. *And be it further enacted,* That registers in bankruptcy shall have power to administer oaths in all cases and in relation to all matters in which oaths may be administered by commissioners of the circuit courts of the United States, and such commissioners may take proof of debts in bankruptcy in all cases, subject to the revision of such proofs by the register and by the court according to the provisions of said act.

Approved, July 27, 1868.

ACT OF JUNE 30, 1870, c. 177.

[16 Statutes at Large, 173]

AN ACT TO AMEND AN ACT ENTITLED "AN ACT TO ESTABLISH A UNIFORM SYSTEM OF BANKRUPTCY THROUGHOUT THE UNITED STATES," APPROVED MARCH 2, 1867.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the jurisdiction conferred on the supreme courts of the Territories by the act to which this is in amendment may be exercised, upon petitions regularly filed in that court, by either of the justices thereof while holding the district court in the district in which the petitioner or the alleged bankrupt resides, and said several supreme courts shall have the same supervisory jurisdiction over all acts and decisions of each justice thereof as is conferred upon the circuit courts of the United States over proceedings in the district courts of the United States by the second section of said act.

SECT. 2. *And be it further enacted,* That in case of a vacancy in the office of district judge in any district, or in case any district judge shall, from sickness, absence, or other disability, be unable to act, the circuit judge of the circuit in which such district is included may make, during such disability or vacancy, all necessary rules and orders preparatory to the final hearing of all causes in bankruptcy, and cause the same to be entered or issued, as the case may require, by the clerk of the district court.

Approved June 30, 1870.

ACT OF JULY 14, 1870, c. 262.

[16 Statutes at Large, 276.]

AN ACT IN AMENDMENT OF AN ACT ENTITLED "AN ACT ESTABLISHING AN UNIFORM SYSTEM OF BANKRUPTCY THROUGHOUT THE UNITED STATES."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the second clause of the thirty-third section of said act, as amended by the first section of an act in amendment thereof, approved July twenty-seven, eighteen hundred and sixty-eight, shall not apply to those debts from which the bankrupt seeks a discharge which were contracted prior to the first day of January, eighteen hundred and sixty-nine.

SECT. 2. *And be it further enacted,* That the clause in the thirtieth section of said act which now reads "or who, being a banker, merchant, or trader, has fraudulently stopped or suspended and not

resumed payment of his commercial paper within a period of fourteen days," shall be amended so as to read as follows: "or who, being a banker, broker, merchant, trader, manufacturer, or miner, has fraudulently stopped payment, or who has stopped or suspended and not resumed payment of his commercial paper within a period of fourteen days."

Approved July 14, 1870.

ACT OF JUNE 8, 1872, c. 339.

[17 Statutes at Large, 334.]

AN ACT TO AMEND AN ACT ENTITLED "AN ACT TO ESTABLISH A UNIFORM SYSTEM OF BANKRUPTCY THROUGHOUT THE UNITED STATES."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first proviso in section fourteen of an act approved March second, eighteen hundred and sixty-seven, entitled "An Act to establish a uniform system of bankruptcy throughout the United States," be amended by striking out the words "eighteen hundred and sixty-four," and inserting in lieu thereof "eighteen hundred and seventy-one."

Approved, June 8, 1872.

ACT OF JUNE 8, 1872, c. 340.

[17 Statutes at Large, 334.]

AN ACT TO DECLARE THE TRUE INTENT AND MEANING OF SECTION TWO OF AN ACT ENTITLED "AN ACT TO ESTABLISH A UNIFORM SYSTEM OF BANKRUPTCY THROUGHOUT THE UNITED STATES," APPROVED MARCH TWO, EIGHTEEN HUNDRED AND SIXTY-SEVEN.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the powers and jurisdiction granted to the several circuit courts of the United States, or any justice thereof, by section two of an act entitled "An Act to establish a uniform system of bankruptcy throughout the United States," approved March second, eighteen hundred and sixty-seven, may be exercised in any district in which the powers or jurisdiction of a circuit court have been or may be conferred on the district court for such district, as if no such powers or jurisdiction had been conferred on such district court; it being the true intent and meaning of said act that the system of bankruptcy thereby established shall be uniform throughout the United States.

Approved June 8, 1872.

ACT OF FEBRUARY 13, 1873, c. 135.

[17 Statutes at Large, 436.]

AN ACT TO AMEND AN ACT ENTITLED "AN ACT TO ESTABLISH A UNIFORM SYSTEM OF BANKRUPTCY THROUGHOUT THE UNITED STATES,"
APPROVED MARCH SECOND, EIGHTEEN HUNDRED AND SIXTY-SEVEN.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That whenever a corporation created by the laws of any State, whose business is carried on wholly within the State creating the same, and also any insurance company so created, whether all its business shall be carried on in such State or not, has had proceedings duly commenced against such corporation or company before the courts of such State for the purpose of winding up the affairs of such corporation or company and dividing its assets ratably among its creditors and lawfully among those entitled thereto prior to proceedings having been commenced against such corporation or company under the bankrupt laws of the United States, any order made, or that shall be made, by such court agreeably to the State law for the ratable distribution or payment of any dividend of assets to the creditors of such corporation or company while such State court shall remain actually or constructively in possession or control of the assets of such corporation or company shall be deemed valid notwithstanding proceedings in bankruptcy may have been commenced and be pending against such corporation or company.

Approved February 13, 1873.

ACT OF MARCH 3, 1873, c. 235.

[17 Statutes at Large, 577.]

AN ACT TO DECLARE THE TRUE INTENT AND MEANING OF THE ACT
APPROVED JUNE EIGHT, EIGHTEEN HUNDRED AND SEVENTY-TWO,
AMENDATORY OF THE GENERAL BANKRUPT LAWS.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That it was the true intent and meaning of an act approved June eighth, eighteen hundred and seventy-two, entitled "An Act to amend an act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved March second, eighteen hundred and sixty-seven," that the exemptions allowed the bankrupt by the said amendatory act should, and it is hereby enacted that they shall, be the amount allowed by the constitution and laws of each State, respectively, as existing in the year eighteen hundred and seventy-one; and that such

exemptions be valid against debts contracted before the adoption and passage of such State constitution and laws, as well as those contracted after the same, and against liens by judgment or decree of any State court, any decision of any such court rendered since the adoption and passage of such constitution and laws to the contrary notwithstanding.

Approved March 3, 1873.

ACT OF JUNE 22, 1874, c. 390.

[18 *Statutes at Large*, 178.]

AN ACT TO AMEND AND SUPPLEMENT AN ACT ENTITLED "AN ACT TO ESTABLISH A UNIFORM SYSTEM OF BANKRUPTCY THROUGHOUT THE UNITED STATES," APPROVED MARCH SECOND, EIGHTEEN HUNDRED AND SIXTY-SEVEN, AND FOR OTHER PURPOSES.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March second, eighteen hundred and sixty-seven, be, and the same is hereby, amended and supplemented as follows: That the court may, in its discretion, on sufficient cause shown, and upon notice and hearing, direct the receiver or assignee to take possession of the property, and carry on the business of the debtor, or any part thereof, under the direction of the court, when, in its judgment, the interest of the estate as well as of the creditors will be promoted thereby, but not for a period exceeding nine months from the time the debtor shall have been declared a bankrupt: *Provided*, That such order shall not be made until the court shall be satisfied that it is approved by a majority in value of the creditors.

SECT. 2. That section one of said act be, and it is hereby, amended by adding thereto the following words: "*Provided*, That the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands, shall, when such debt does not exceed five hundred dollars, be collected in the courts of the State where such bankrupt resides having jurisdiction of claims of such nature and amount."

SECT. 3. That section two of said act be, and it hereby is, amended by striking out, in line ten, the words "the same," and inserting the word "any"; and by adding next after the words "adverse interest," in line twelve, the words "or owing any debt to such bankrupt."

SECT. 4. That unless otherwise ordered by the court, the assignee shall sell the property of the bankrupt, whether real or personal, at public auction, in such parts or parcels and at such times and places as shall be best calculated to produce the greatest amount with the least expense. All notices of public sales under this act by any assignee

or officer of the court shall be published once a week for three consecutive weeks in the newspaper or newspapers, to be designated by the judge, which, in his opinion, shall be best calculated to give general notice of the sale. And the court, on the application of any party in interest, shall have complete supervisory power over such sales, including the power to set aside the same and to order a re-sale, so that the property sold shall realize the largest sum. And the court may, in its discretion, order any real estate of the bankrupt, or any part thereof, to be sold for one fourth cash at the time of sale, and the residue within eighteen months in such instalments as the court may direct, bearing interest at the rate of seven per centum per annum, and secured by proper mortgage or lien upon the property so sold. And it shall be the duty of every assignee to keep a regular account of all moneys received or expended by him as such assignee, to which account every creditor shall, at reasonable times, have free access. If any assignee shall fail or neglect to well and faithfully discharge his duties in the sale or disposition of property as above contemplated, it shall be the duty of the court to remove such assignee, and he shall forfeit all fees and emoluments to which he might be entitled in connection with such sale. And if any assignee shall, in any manner, in violation of his duty aforesaid, unfairly or wrongfully sell or dispose of, or in any manner fraudulently or corruptly combine, conspire, or agree with any person or persons, with intent to unfairly or wrongfully sell or dispose of the property committed to his charge, he shall, upon proof thereof, be removed, and forfeit all fees or other compensation for any and all services in connection with such bankrupt's estate, and, upon conviction thereof before any court of competent jurisdiction, shall be liable to a fine of not more than ten thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both fine and imprisonment, at the discretion of the court. And any person so combining, conspiring, or agreeing with such assignee for the purpose aforesaid shall, upon conviction, be liable to a like punishment. That the assignee shall report, under oath, to the court, at least as often as once in three months, the condition of the estate in his charge, and the state of his accounts in detail, and at all other times when the court, on motion or otherwise, shall so order. And on any settlement of the accounts of any assignee, he shall be required to account for all interest, benefit, or advantage received, or in any manner agreed to be received, directly or indirectly, from the use, disposal, or proceeds of the bankrupt's estate. And he shall be required, upon such settlement, to make and file in court an affidavit declaring, according to the truth, whether he has or has not, as the case may be, received, or is or is not, as the case may be, to receive, directly or indirectly, any interest, benefit, or advantage from the use or deposit of such funds; and such assignee may be examined orally upon the same subject, and if he shall wilfully swear falsely, either in such affidavit or examination, or to his report provided for in this section, he shall be deemed to be guilty of perjury, and, on conviction,

tion thereof, be punished by imprisonment in the penitentiary not less than one and not more than five years.

SECT. 5. That section eleven of said act be amended by striking out the words "as the warrant specifies," where they first occur, and inserting the words "as the marshal shall select, not exceeding two;" and inserting after the word "specifies" where it last occurs the words "But whenever the creditors of the bankrupt are so numerous as to make any notice now required by law to them, by mail or otherwise, a great and disproportionate expense to the estate, the court may, in lieu thereof, in its discretion, order such notice to be given by publication in a newspaper or newspapers, to all such creditors whose claims, as reported, do not exceed the sums, respectively, of fifty dollars."

SECT. 6. That the first clause of section twenty of said act be amended by adding, at the end thereof, the words "or in cases of compulsory bankruptcy, after the act of bankruptcy upon or in respect of which the adjudication shall be made, and with a view of making such set-off."

SECT. 7. That section twenty-one of said act be amended by inserting the following words in line six, immediately after "thereby": "But a creditor proving his debt or claim shall not be held to have waived his right of action or suit against the bankrupt where a discharge has been refused or the proceedings have been determined without a discharge."

SECT. 8. That the following words shall be added to section twenty-six of said act: "That in all causes and trials arising or ordered under this act, the alleged bankrupt, and any party thereto, shall be a competent witness."

SECT. 9. That in cases of compulsory or involuntary bankruptcy, the provisions of said act, and any amendment thereof, or of any supplement thereto, requiring the payment of any proportion of the debts of the bankrupt, or the assent of any portion of his creditors, as a condition of his discharge from his debts, shall not apply; but he may, if otherwise entitled thereto, be discharged by the court in the same manner and with the same effect as if he had paid such per centum of his debts, or as if the required proportion of his creditors had assented thereto. And in cases of voluntary bankruptcy, no discharge shall be granted to a debtor whose assets shall not be equal to thirty per centum of the claims proved against his estate, upon which he shall be liable as principal debtor, without the assent of at least one-fourth of his creditors in number, and one-third in value; and the provision in section thirty-three of said act of March second, eighteen hundred and sixty-seven, requiring fifty per centum of such assets, is hereby repealed.

SECT. 10. That in cases of involuntary or compulsory bankruptcy, the period of four months mentioned in section thirty-five of the act to which this is an amendment is hereby changed to two months; but this provision shall not take effect until two months after the passage of this act. And in the cases aforesaid, the period of six months men-

tioned in said section thirty-five is hereby changed to three months; but this provision shall not take effect until three months after the passage of this act.

SECT. 11. That section thirty-five of said act be, and the same is hereby, amended as follows:

First. After the word "and" in line eleven, insert the word "knowing."

Secondly. After the word "attachment," in the same line, insert the words "sequestration, seizure."

Thirdly. After the word "and," in line twenty, insert the word "knowing." And nothing in said section thirty-five shall be construed to invalidate any loan of actual value, or the security therefor, made in good faith, upon a security taken in good faith on the occasion of the making of such loan.

SECT. 12. That section thirty-nine of said act of March second, eighteen hundred and sixty-seven, be amended so as to read as follows:—

"SECT. 39. That any person residing, and owing debts, as aforesaid, who, after the passage of this act, shall depart from the State, District, or Territory of which he is an inhabitant, with intent to defraud his creditors; or, being absent, shall, with such intent, remain absent; or shall conceal himself to avoid the service of legal process in any action for the recovery of a debt or demand provable under this act; or shall conceal or remove any of his property to avoid its being attached, taken, or sequestered on legal process; or shall make any assignment, gift, sale, conveyance, or transfer of his estate, property, rights, or credits, either within the United States or elsewhere, with intent to delay, defraud, or hinder his creditors; or who has been arrested and held in custody under or by virtue of mesne process or execution, issued out of any court of the United States or of any State, District, or Territory within which such debtor resides or has property, founded upon a demand in its nature provable against a bankrupt's estate under this act, and for a sum exceeding one hundred dollars, and such process is remaining in force and not discharged by payment, or in any other manner provided by the law of the United States or of such State, District, or Territory applicable thereto, for a period of twenty days, or has been actually imprisoned for more than twenty days in a civil action founded on contract for the sum of one hundred dollars or upward; or who, being bankrupt or insolvent, or in contemplation of bankruptcy or insolvency, shall make any payment, gift, grant, sale, conveyance, or transfer of money or other property, estate, rights, or credits, or confess judgment, or give any warrant to confess judgment, or procure his property to be taken on legal process, with intent to give a preference to one or more of his creditors, or to any person or persons who are or may be liable for him as indorsers, bail, sureties, or otherwise, or with the intent, by such disposition of his property, to defeat or delay the operation of this act; or who being a bank, banker,

broker, merchant, trader, manufacturer, or miner, has fraudulently stopped payment, or who being a bank, banker, broker, merchant, trader, manufacturer, or miner, has stopped or suspended and not resumed payment, within a period of forty days, of his commercial paper (made or passed in the course of his business as such), or who, being a bank or banker, shall fail for forty days to pay any depositor upon demand of payment lawfully made, shall be deemed to have committed an act of bankruptcy, and, subject to the conditions hereinafter prescribed, shall be adjudged a bankrupt on the petition of one or more of his creditors, who shall constitute one-fourth thereof, at least, in number, and the aggregate of whose debts provable under this act amounts to at least one-third of the debts so provable: *Provided*: That such petition is brought within six months after such act of bankruptcy shall have been committed. And the provisions of this section shall apply to all cases of compulsory or involuntary bankruptcy commenced since the first day of December, eighteen hundred and seventy-three, as well as to those commenced hereafter. And in all cases commenced since the first day of December, eighteen hundred and seventy-three, and prior to the passage of this act, as well as those commenced hereafter, the court shall, if such allegation as to the number or amount of petitioning creditors be denied by the debtor, by a statement in writing to that effect, require him to file in court forthwith a full list of his creditors, with their places of residence and the sums due them respectively, and shall ascertain, upon reasonable notice to the creditors, whether one-fourth in number and one-third in amount thereof, as aforesaid, have petitioned that the debtor be adjudged a bankrupt. But if such debtor shall, on the filing of the petition, admit in writing that the requisite number and amount of creditors have petitioned, the court (if satisfied that the admission was made in good faith) shall so adjudge, which judgment shall be final, and the matter proceed without further steps on that subject. And if it shall appear that such number and amount have not so petitioned, the court shall grant reasonable time, not exceeding, in cases heretofore commenced, twenty days, and, in cases hereinafter commenced, ten days, within which other creditors may join in such petition. And if, at the expiration of such time so limited, the number and amount shall comply with the requirements of this section, the matter of bankruptcy may proceed; but if, at the expiration of such limited time, such number and amount shall not answer the requirements of this section, the proceedings shall be dismissed, and, in cases hereafter commenced, with costs. And if such person shall be adjudged a bankrupt, the assignee may recover back the money or property so paid, conveyed, sold, assigned, or transferred contrary to this act: *Provided*, That the person receiving such payment or conveyance had reasonable cause to believe that the debtor was insolvent, and knew that a fraud on this act was intended; and such person, if a creditor, shall not, in cases of actual fraud on his part, be allowed to prove for more than a moiety of his

debt; and this limitation on the proof of debts shall apply to cases of voluntary as well as involuntary bankruptcy. And the petition of creditors under this section may be sufficiently verified by the oaths of the first five signers thereof, if so many there be. And if any of said first five signers shall not resign in the district in which such petition is to be filed, the same may be signed and verified by the oath or oaths of the attorney or attorneys, agent or agents, of such signers. And in computing the number of creditors, as aforesaid, who shall join in such petition, creditors whose respective debts do not exceed two hundred and fifty dollars shall not be reckoned. But if there be no creditors whose debts exceed said sum of two hundred and fifty dollars, or if the requisite number of creditors holding debts exceeding two hundred and fifty dollars fail to sign the petition, the creditors having debts of a less amount shall be reckoned for the purposes aforesaid."

SECT. 13. That section forty of said act be amended by adding at the end thereof the following words: "And if, on the return-day of the order to show cause as aforesaid, the court shall be satisfied that the requirement of section thirty-nine of said act as to the number and amount of petitioning creditors has been complied with, or if, within the time provided for in section thirty-nine of this act, creditors sufficient in number and amount shall sign such petition so as to make a total of one-fourth in number of the creditors and one-third in the amount of the provable debts against the bankrupt, as provided in said section, the court shall so adjudge, which judgment shall be final; otherwise it shall dismiss the proceedings, and, in cases hereafter commenced, with costs."

SECT. 14. That section forty-one of said act be amended as follows: After the word "bankruptcy," in line eight, strike out all of said section, and insert the words, "Or, at the election of the debtor, the court may, in its discretion, award a venire facias to the marshal of the district, returnable within ten days before him for the trial of the facts set forth in the petition, at which time the trial shall be had, unless adjourned for cause. And unless, upon such hearing or trial, it shall appear to the satisfaction of said court, or of the jury, as the case may be, that the facts set forth in said petition are true, or if it shall appear that the debtor has paid and satisfied all liens upon his property, in case the existence of such liens was the sole ground of the proceeding, the proceeding shall be dismissed, and the respondent shall recover costs; and all proceedings in bankruptcy may be discontinued on reasonable notice and hearing, with the approval of the court, and upon the assent, in writing, of such debtor, and not less than one-half of his creditors in number and amount; or, in case all the creditors and such debtor assent thereto, such discontinuance shall be ordered and entered; and all parties shall be remitted, in either case, to the same rights and duties existing at the date of the filing of the petition for bankruptcy, except so far as such estate shall have been already administered and disposed of. And the court shall have power to make

all needful orders and decrees to carry the foregoing provision into effect."

SECT. 15. That section eleven of said act be amended by inserting the words "and valuation" after the word "inventory" in the twenty-first line; and that section forty-two of said act be amended by inserting the words "and valuation" after the word "inventory" in the fifteenth line.

SECT. 16. That section forty-nine of said act be amended by striking out after the word "the," in line five, the words "supreme courts," and inserting in lieu thereof "district courts," and in line six, after the word "States," inserting the words "subject to the general superintendence and jurisdiction conferred upon circuit courts by section two of said act."

COMPOSITION WITH CREDITORS.

SECT. 17. That the following provisions be added to section forty-three of said act: That in all cases of bankruptcy now pending, or to be hereafter pending, by or against any person, whether an adjudication in bankruptcy shall have been had or not, the creditors of such alleged bankrupt may, at a meeting called under the direction of the court, and upon not less than ten days' notice to each known creditor of the time, place, and purpose of such meeting, such notice to be personal or otherwise, as the court may direct, resolve that a composition proposed by the debtor shall be accepted in satisfaction of the debts due to them from the debtor. And such resolution shall, to be operative, have been passed by a majority in number, and three-fourths in value of the creditors of the debtor assembled at such meeting either in person or by proxy, and shall be confirmed by the signatures thereto of the debtor and two-thirds in number and one-half in value of all the creditors of the debtor. And in calculating a majority for the purposes of a composition under this section, creditors whose debts amount to sums not exceeding fifty dollars shall be reckoned in the majority in value, but not in the majority in number; and the value of the debts of secured creditors above the amount of such security, to be determined by the court, shall, as nearly as circumstances admit, be estimated in the same way. And creditors whose debts are fully secured shall not be entitled to vote upon or to sign such resolution without first relinquishing such security for the benefit of the estate.

The debtor, unless prevented by sickness or other cause satisfactory to such meeting, shall be present at the same, and shall answer any inquiries made of him; and he, or, if he is so prevented from being at such meeting, some one in his behalf, shall produce to the meeting a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts respectively are due.

Such resolution, together with the statement of the debtor as to his assets and debts, shall be presented to the court; and the court shall,

upon notice to all the creditors of the debtor of not less than five days, and upon hearing, inquire whether such resolution has been passed in the manner directed by this section ; and if satisfied that it has been so passed, it shall, subject to the provisions hereinafter contained, and upon being satisfied that the same is for the best interest of all concerned, cause such resolution to be recorded and statement of assets and debts to be filed ; and until such record and filing shall have taken place, such resolution shall be of no validity. And any creditor of the debtor may inspect such record and statement at all reasonable times.

The creditors may, by resolution passed in the manner and under the circumstances aforesaid, add to, or vary the provisions of, any composition previously accepted by them, without prejudice to any persons taking interests under such provisions who do not assent to such addition or variation. And any such additional resolution shall be presented to the court in the same manner and proceeded with in the same way and with the same consequences as the resolution by which the composition was accepted in the first instance. The provisions of a composition accepted by such resolution in pursuance of this section shall be binding on all the creditors whose names and addresses and the amounts of the debts due to whom are shown in the statement of the debtor produced at the meeting at which the resolution shall have been passed, but shall not affect or prejudice the rights of any other creditors.

Where a debt arises on a bill of exchange or promissory note, if the debtor shall be ignorant of the holder of any such bill of exchange or promissory note, he shall be required to state the amount of such bill or note, the date on which it falls due, the name of the acceptor, and of the person to whom it is payable, and any other particulars within his knowledge respecting the same ; and the insertion of such particulars shall be deemed a sufficient description by the debtor in respect to such debt.

Any mistake made inadvertently by a debtor in the statement of his debts may be corrected upon reasonable notice, and with the consent of a general meeting of his creditors.

Every such composition shall, subject to priorities declared in said act, provide for a pro-rata payment or satisfaction, in money, to the creditors of such debtor in proportion to the amount of their unsecured debts, or their debts in respect to which any such security shall have been duly surrendered and given up.

The provisions of any composition made in pursuance of this section may be enforced by the court, on motion made in a summary manner by any person interested, and on reasonable notice ; and any disobedience of the order of the court made on such motion shall be deemed to be a contempt of court. Rules and regulations of court may be made in relation to proceedings of composition herein provided for in the same manner and to the same extent as now provided by law in relation to proceedings in bankruptcy.

If it shall at any time appear to the court, on notice, satisfactory evidence, and hearing, that a composition under this section cannot, in consequence of legal difficulties, or for any sufficient cause, proceed without injustice or undue delay to the creditors or to the debtor, the court may refuse to accept and confirm such composition, or may set the same aside; and, in either case, the debtor shall be proceeded with as a bankrupt in conformity with the provisions of law, and proceedings may be had accordingly; and the time during which such composition shall have been in force shall not, in such case, be computed in calculating periods of time prescribed by said act.

SECT. 18. That from and after the passage of this act the fees, commissions, charges, and allowances, excepting actual and necessary disbursements, of, and to be made by the officers, agents, marshals, messengers, assignees, and registers in cases of bankruptcy, shall be reduced to one-half of the fees, commissions, charges, and allowances heretofore provided for or made in like cases: *Provided*, That the preceding provision shall be and remain in force until the justices of the Supreme Court of the United States shall make and promulgate new rules and regulations in respect to the matters aforesaid, under the powers conferred upon them by sections ten and forty-seven of said act, and no longer, which duties they shall perform as soon as may be. And said justices shall have power under said sections, by general regulations, to simplify and, so far as in their judgment will conduce to the benefit of creditors, to consolidate the duties of the register, assignee, marshal, and clerk, and to reduce fees, costs, and charges, to the end that prolixity, delay, and unnecessary expense may be avoided. And no register or clerk of court, or any partner or clerk of such register or clerk of court, or any person having any interest with either in any fees or emoluments in bankruptcy, or with whom such register or clerk of court shall have any interest in respect to any matter in bankruptcy, shall be of counsel, solicitor, or attorney, either in or out of court, in any suit or matter pending in bankruptcy in either the circuit or district court of his district, or in an appeal therefrom. Nor shall they, or either of them, be executor, administrator, guardian, commissioner, appraiser, divider, or assignee, of or upon any estate within the jurisdiction of either of said courts of bankruptcy; nor be interested, directly or indirectly, in the fees or emoluments arising from either of said trusts. And the words "except such as are established by this act or by law," in section ten of said act, are hereby repealed.

SECT. 19. That it shall be the duty of the marshal of each district, in the month of July of each year, to report to the clerk of the district court of such district, in a tabular form, to be prescribed by the justices of the Supreme Court of the United States, as well as such other or further information as may be required by said justices.

First, the number of cases in bankruptcy in which the warrant prescribed in section eleven of said act has come to his hands during the year ending June thirtieth, preceding;

Secondly, how many such warrants were returned, with the fees, costs, expenses, and emoluments thereof, respectively and separately ;

Thirdly, the total amount of all other fees, costs, expenses, and emoluments, respectively and separately, earned or received by him during such year from or in respect of any matter in bankruptcy ;

Fourthly, a summarized statement of such fees, costs, and emoluments, exclusive of actual disbursements in bankruptcy, received or earned for such year ;

Fifthly, a summarized statement of all actual disbursements in such cases for such year.

And in like manner, every register shall, in the same month and for the same year, make a report to such clerk of,

First, the number of voluntary cases in bankruptcy coming before him during said year ;

Secondly, the amount of assets and liabilities, as nearly as may be, of the bankrupts ;

Thirdly, the amount and rate per centum of all dividends declared ;

Fourthly, the disposition of all such cases ;

Fifthly, the number of compulsory cases in bankruptcy coming before him, in the same way ;

Sixthly, the amount of assets and liabilities, as nearly as may be, of such bankrupt ;

Seventhly, the disposition of all such cases ;

Eighthly, the amounts and rate per centum of all dividends declared in such cases ;

Ninthly, the total amount of fees, charges, costs, and emoluments of every sort, received or earned by such register during said year in each class of cases above stated ;

And in like manner, every assignee shall, during said month, make like return to such clerk of,

First, the number of voluntary and compulsory cases, respectively and separately, in his charge during said year ;

Secondly, the amount of assets and liabilities therein, respectively and separately ;

Thirdly, the total receipts and disbursements therein, respectively and separately ;

Fourthly, the amount of dividends paid or declared, and the rate per centum thereof, in each class, respectively and separately ;

Fifthly, the total amount of all his fees, charges, and emoluments of every kind therein, earned or received ;

Sixthly, the total amount of expenses incurred by him for legal proceedings and counsel fees ;

Seventhly, the disposition of the cases respectively ;

Eighthly, a summarized statement of both classes as aforesaid.

And in like manner, the clerk of said court, in the month of August in each year, shall make up a statement for such year, ending June thirtieth, of,

First, all cases in bankruptcy pending at the beginning of said year ;
Secondly, all of such cases disposed of ;
Thirdly, all dividends declared therein ;
Fourthly, the number of reports made from each assignee therein ;
Fifthly, the disposition of all such cases ;
Sixthly, the number of assignees' accounts filed and settled ;

Seventhly, whether any marshal, register, or assignee has failed to make and file with such clerk the reports by this act required, and, if any have failed to make such reports, their respective names and residences.

And such clerk shall report in respect of all cases begun during said year.

And he shall make a classified statement, in tabular form, of all his fees, charges, costs, and emoluments, respectively, earned or accrued during said year, giving each head under which the same accrued, and also the sum of all moneys paid into and disbursed out of court in bankruptcy, and the balance in hand or on deposit.

And all the statements and reports herein required shall be under oath, and signed by the persons respectively making the same.

And said clerk shall, in said month of August, transmit every such statement and report so filed with him, together with his own statement and report aforesaid, to the Attorney-General of the United States.

Any person who shall violate the provisions of this section shall, on motion made, under the direction of the Attorney-General, be by the district court dismissed from his office, and shall be deemed guilty of a misdemeanor, and, on conviction thereof, be punished by a fine of not more than five hundred dollars, or by imprisonment not exceeding one year.

SECT. 20. That in addition to the officers now authorized to take proof of debts against the estate of a bankrupt, notaries public are hereby authorized to take such proof, in the manner and under the regulations provided by law ; such proof to be certified by the notary and attested by his signature and official seal.

SECT. 21. That all acts and parts of acts inconsistent with the provisions of this act be, and the same are hereby, repealed.

Approved, June 22, 1874.

ACT OF APRIL 14, 1876, c. 62.

[19 Statutes at Large, 33.]

AN ACT CONCERNING CASES IN BANKRUPTCY COMMENCED IN THE SUPREME COURTS OF THE SEVERAL TERRITORIES PRIOR TO THE TWENTY-SECOND DAY OF JUNE, EIGHTEEN HUNDRED AND SEVENTY-FOUR, AND NOW UNDETERMINED THEREIN.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases in

bankruptcy commenced in the supreme courts of any of the Territories of the United States prior to the twenty-second day of June, Anno Domini eighteen hundred and seventy-four, and now undetermined therein, the clerks of the said several courts shall immediately transmit to the clerks of the district courts of the several districts of said Territories all the papers in, and a certified transcript of, all the proceedings had in each of said cases; and the said clerks of the district courts shall immediately file the said papers and transcripts in the said district courts.

SECT. 2. That the clerks of the said several supreme courts shall transmit the papers and transcripts provided for in section one of this act, in each case, to the clerk of the district court of the district wherein the bankrupt or bankrupts, or some one of them, resided at the time of the filing of the petition in bankruptcy in said case; and as soon as the said papers and transcript in any case shall have been transmitted and filed, as herein provided, the district court in which the same shall have been so filed shall have jurisdiction of the said case, to hear and determine all questions arising therein, and to finally adjudicate and determine the same in all respects as contemplated in other bankruptcy cases by the act entitled "An act to establish a uniform system of bankruptcy throughout the United States," and approved March second, eighteen hundred and sixty-seven, and amendments thereto.

Approved, April 14, 1876.

ACT OF JULY 26, 1876, c. 234.

[19 Statutes at Large, 102.]

AN ACT TO AMEND THE ACT ENTITLED "AN ACT TO AMEND AND SUPPLEMENT AN ACT ENTITLED 'AN ACT TO ESTABLISH A UNIFORM SYSTEM OF BANKRUPTCY THROUGHOUT THE UNITED STATES,' APPROVED MARCH SECOND, EIGHTEEN HUNDRED AND SIXTY-SEVEN, AND FOR OTHER PURPOSES," APPROVED JUNE TWENTY-SECOND, EIGHTEEN HUNDRED AND SEVENTY-FOUR.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twelve of said act be, and the same is hereby, amended as follows: After the word "committed," in line forty-four, insert: "*Provided also,* That no voluntary assignment by a debtor or debtors of all his or their property, heretofore or hereafter made in good faith for the benefit of all his or their creditors, ratably and without creating any preference, and valid according to the law of the State where made, shall of itself, in the event of his or their being subsequently adjudicated bankrupts in a proceeding of involuntary bankruptcy, be a bar to the discharge of such debtor or debtors." That section fifty-one hundred and eight of the Revised Statutes is hereby amended so as to read as follows: At any

time after the expiration of six months from the adjudication of bankruptcy, or if no debts have been proved against the bankrupt, or if no assets have come to the hands of the assignee, at any time after the expiration of sixty days, and before the final disposition of the cause, the bankrupt may apply to the court for a discharge from his debts. This section shall apply in all cases heretofore or hereafter commenced.

Approved, July 26, 1876.

ACT OF JUNE 7, 1878, c. 160.

[20 Statutes at Large, 99.]

AN ACT TO REPEAL THE BANKRUPT LAW.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the bankrupt law approved March second, eighteen hundred and sixty-seven, title sixty-one, Revised Statutes, and an act entitled "An act to amend and supplement an act entitled An act to establish a uniform system of bankruptcy throughout the United States, approved March second, eighteen hundred and sixty-seven, and for other purposes, approved June twenty-second, eighteen hundred and seventy-four," and all acts in amendment or supplementary thereto or in explanation thereof, be, and the same are hereby, repealed: *Provided, however,* That such repeal shall in no manner invalidate or affect any case in bankruptcy instituted and pending in any court prior to the day when this act shall take effect; but as to all such pending cases and all future proceedings therein, and in respect of all pains, penalties, and forfeitures which shall have been incurred under any of said acts prior to the day when this act takes effect, or which may be thereafter incurred, under any of those provisions of any of said acts which, for the purposes named in this act, are kept in force, and all penal actions and criminal proceedings for a violation of any of said acts, whether then pending or thereafter instituted, and in respect of all rights of debtors and creditors (except the right of commencing original proceedings in bankruptcy), and all rights of, and suits by, or against assignees, under any or all of said acts, in any matter or case which shall have arisen prior to the day when this act takes effect (which shall be on the first day of September, anno Domini eighteen hundred and seventy-eight), or in any matter or case which shall arise after this act takes effect, in respect of any matter of bankruptcy authorized by this act to be proceeded with after said last-named day, the acts hereby repealed shall continue in full force and effect until the same shall be fully disposed of, in the same manner as if said acts had not been repealed.

Approved, June 7, 1878.

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PART II.

CASES.

CHAPTER I.

RESPECTIVE JURISDICTIONS OF THE UNITED STATES AND
THE SEVERAL STATES.

SECTION I.

EXTENT OF THE POWERS OF THE UNITED STATES.

CONSTITUTION OF THE UNITED STATES.

ARTICLE I., SECTION 8.

THE Congress shall have Power . . . to establish . . . uniform
Laws on the subject of Bankruptcies throughout the United States.

LEIDIGH CARRIAGE CO. v. STENGEL.¹

CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, MAY 2, 1899.

[Reported in 95 Federal Reporter, 637.]

BEFORE TAFT and LURTON, Circuit Judges, and CLARK, District
Judge.

TAFT, Circuit Judge. The last assignment of error is based on the
claim that the federal act is unconstitutional. The ground for this
contention is that the act is not uniform, in that a distinction is made
between natural persons and artificial, and further, that the distinction
is made between classes of artificial persons. All natural persons can
be adjudged voluntary or involuntary bankrupts; whereas, artificial
persons, of the character of the Leidigh Carriage Company, cannot be
adjudged voluntary bankrupts, but can be adjudged involuntary bank-
rupts, and other corporations cannot be adjudged either voluntary or

¹ Only so much of the opinion is printed as relates to the constitutionality of the
Bankrupt Act.

involuntary bankrupts. In our judgment, the power given to Congress in section 8 of article 1, "to establish uniform laws on the subject of bankruptcies throughout the United States," imposes no limitation upon Congress as to the classification of persons who are to be affected by such laws, provided only the laws shall have uniform operation throughout the United States. The object which the framers of the Constitution had was to enable Congress to prevent the enforcement of as many different bankrupt laws as there were States. The meaning of the language of the Constitution is not changed by arranging the words in a slightly different order, so that it shall read, "to establish laws on the subject of bankruptcies uniform throughout the United States." The emphasis in the phrase is on the words "uniform" and "throughout," and their correlation leaves no doubt that the uniformity required is geographical, and not personal, in the sense of being alike applicable to all members of the community.

The history of the bankrupt laws in England shows that a bankrupt law, when our Constitution was adopted, which applied to all members of the community alike, would have been a great anomaly. The first bankrupt act passed in England was St. 34 & 35 Hen. VIII. c. 4, "against such as do make bankrupt." The provisions of this act were extended and expanded by Act 13 Eliz. c. 7; by Act 21 Jac. I. c. 19; by Act 7 Geo. I. c. 31; by Act 5 Geo. II. c. 30; by Act 46 Geo. III. c. 135; by Act 6 Geo. IV. c. 16; and by Act 1 & 2 Wm. IV. c. 56. From the days of Henry VIII. to the days of Victoria the English bankruptcy acts applied only to traders, and it was not until the act of 1861 that the bankruptcy extended to nontraders. The United States bankrupt law of 1800, the first bankrupt law passed after the Constitution was adopted, was an involuntary law, and applied only to traders, bankers, brokers, and underwriters. 2 Stat. 19, § 1.

The question of the classes of persons to be affected by the bankrupt law is one largely, if not wholly, within the discretion of Congress. Chief Justice Marshall said in *Sturgis v. Crowninshield*, 4 Wheat. 122, 194: "The bankrupt law is said to grow out of the exigencies of commerce, and to be applicable solely to traders; but it is not easy to say who must be excluded from, or may be included in, this description. It is, like every other part of the subject, one on which the legislature may exercise an extensive discretion." Certainly it cannot be said that, in enacting the present law, Congress has passed the limits of such discretion. The proper purposes of a bankruptcy act like the present are: First (and this was its original purpose), to enable creditors to protect themselves by summary process against the frauds of their debtors in evading the payment of debts; second, to distribute the assets of the debtor equally among his creditors; and, third, to relieve debtors from the burden of debts, which, through business misfortunes and otherwise, they have incurred, and which they are unable to pay. In England, until 1849, there was no provision by which

petitions in voluntary bankruptcy could be filed, though there had previously been acts for the relief of insolvent debtors from an early period; and Parliament had, as Mr. Justice Vaughn Williams points out in *Re Painter* [1895] 1 Q. B. 85, recognized that the State has an interest in the debtor being relieved from his liability, so that he shall not be weighed down by the burden of indebtedness from discharging the duties of a citizen and may employ himself in honest industry. The reason why bankruptcy legislation was limited to traders for so many centuries was because it was considered that traders were the class having the greatest opportunity, and therefore most likely, to commit the frauds which bankruptcy acts were passed to prevent.

It seems to us that the classification which Congress has imposed is entirely reasonable, having regard to the proper objects for which such a law may be passed. By the present act, any person who owes debts, except a corporation, is entitled to the benefits of the act as a voluntary bankrupt. The exception finds a proper basis in the fact that it is of no particular good to the State or the public to relieve an artificial entity from a burden of indebtedness after it has failed in the purpose for which it was organized. The individuals interested in the corporation as stockholders, so far as they may be made liable for its debts, have the opportunity, should the liability render them insolvent, to apply by voluntary petition to be relieved from that indebtedness. The corporation itself, however, is practically defunct the moment that its business stops on account of its debts, and, if the same enterprise ought to be carried on, it is better for the public and the State that a new corporation be formed for the purpose.

Any natural person may be adjudged an involuntary bankrupt except wage-earners and farmers. The involuntary feature of the law is chiefly directed against frauds upon creditors. A wage-earner who depends upon his salary — a salary limited to \$1,500 a year — is not likely to be able to contract debts of any great amount, and is not likely to have an opportunity to commit the frauds denounced in the bankruptcy act. The same thing may be said of one in tilling the earth. The capital of the farmer is largely in the land. His crops are difficult of disposition, except at certain seasons of the year. He lives in a comparatively sparsely-settled community, in which his transactions with respect to his property are likely to be well known to his neighbors, and the opportunities for fraud are quite limited.

Any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits owing debts of \$1,000, may be adjudged an involuntary bankrupt. So, too, may a private banker. This is merely an effort to limit the application of the involuntary feature to that class of corporations which would have come under the head of "traders" at common law. National banks and State banks are not included, because it was properly assumed by Congress that the statutory provisions for winding up such corporations were usually so summary,

complete, and drastic that no additional safeguards against frauds were needed. The action of the District Court sitting in bankruptcy is affirmed, at the costs of the appellants.¹

¹ French v. Smith, [Minn.] 84 N. W. Rep. 44 acc.

Before the passage of the bankruptcy act of 1841, it was strongly contended in Congress that such an act was unconstitutional, as not coming within the meaning of a bankruptcy law. It was argued that the Constitution must be construed in the light of the English laws in regard to bankruptcy passed before 1789. By those laws, voluntary petitions had never been allowed and the application of the system was confined to traders. In *Adams v. Storey*, 1 Paine C. C. 79, 82, Judge Livingston of the U. S. Supreme Court said: "So exclusively have bankrupt laws operated on traders, that it may well be doubted whether an act of Congress subjecting to such a law every description of persons within the United States would comport with the spirit of the powers vested in them in relation to this subject." After the passage of the act it was held to be unconstitutional by Judge Wells of the U. S. District Court for the District of Missouri in *Re Klein*, 2 N. Y. Leg. Obs. 185, and an elaborate dissenting dictum to the same effect was pronounced by Judge Bronson in *Sackett v. Andross*, 5 Hill, 327; but the decision of the District Court in *Re Klein* was reversed in the Circuit Court by Judge Catron of the U. S. Supreme Court, 1 How. 277, note. The question was not raised in the U. S. Supreme Court because under the act of 1841 no bankruptcy cases could come before that court for review. *Nelson v. Carland*, 1 How. 265.

But many decisions in other courts sustained the validity of the act. *State Bank v. Phillips*, 6 Ark. 35; *Lalor v. Wattles*, 8 Ill. 225; *Hastings v. Fowler*, 2 Ind. 216; *Loud v. Pierce*, 25 Me. 233; *Thompson v. Alger*, 12 Met. 428; *Reed v. Vaughan*, 15 Mo. 137; *Kittredge v. Warren*, 14 N. H. 509; *Cutter v. Folsom*, 17 N. H. 139; *Kunzler v. Kohaus*, 5 Hill, 317; *McCormick v. Pickering*, 4 N. Y. 276.

The act of 1867 was, as a whole, uniformly held constitutional. *Re Silverman*, 4 B. R. 522; *Re Reynolds*, 9 B. R. 50; *Re Reiman*, 11 B. R. 21; *Re California Pacific R. Co.*, 11 B. R. 193. The validity of some provisions was, however, contested. *U. S. v. Fox*, 95 U. S. 670, overruling *U. S. v. Clark*, 4 B. R. 59 and *U. S. v. Pusey*, 6 B. R. 284, held unconstitutional the provision (Rev. Stat. § 5,132, 9.), making it a criminal offence to obtain goods on credit with intent to defraud within three months before the beginning of bankruptcy proceedings, since the criminality of the act was made to depend on subsequent events. It was also urged that the provision of the act was unconstitutional which allowed bankrupts whatever exemptions were allowed by the law in force in 1864 of the State in which the proceedings took place, because it prevented the law from being uniform. But the constitutionality of this provision was regarded as settled by the decision of Judges Miller and Krekel in *Re Beckerkord*, 4 B. R. 203. See also *Re Jordan*, 8 B. R. 180. Later, however, Congress, by act of June 8, 1872, amended this provision so as to allow whatever exemptions were allowed by State laws in force in 1870; and by act of March 3, 1873, which purported to be merely declaratory, enacted that these exemptions should be allowed as against debts created before as well as after the passage of the State laws in question. This statutory construction of the amendment of 1872 was held unconstitutional by Chief-Justice Waite in *Re Deckert*, 10 B. R. 1, and similar decisions were rendered in *Re Dillard*, 9 B. R. 8; *Re Duerson*, 13 B. R. 183; *Bush v. Lester*, 55 Ga. 579. But contrary decisions are *Re Jordan*, 8 B. R. 180; *Re Kean*, 8 B. R. 367; *Re Smith*, 8 B. R. 401, 14 B. R. 295; *Re Everitt*, 9 B. R. 90; *Re Jordan*, 10 B. R. 427.

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SECTION II.

EXTENT OF THE POWERS OF THE SEVERAL STATES.

BALDWIN v. HALE.

SUPREME COURT OF THE UNITED STATES, DECEMBER TERM, 1863.

[Reported in 1 Wallace, 223.]

THIS was a writ of error to the Circuit Court for the District of Massachusetts; the case, as appearing from an agreed statement of facts, being thus:—

J. W. Baldwin, a citizen of Massachusetts, made, at Boston, in that State, his promissory note, payable there, in these words:

\$2,000

BOSTON, February 21, 1854.

Six months after date I promise to pay to the order of myself, two thousand dollars, payable in Boston, value received.

J. W. BALDWIN.

And duly indorsed it to Hale, the plaintiff, then and afterwards a citizen of Vermont. After the date of the note, but before any suit was brought upon it, Baldwin, upon due proceedings in the Court of Insolvency of the State of Massachusetts, obtained a certificate of discharge from his debts; the certificate embracing by its terms all contracts to be performed within the State of Massachusetts. Hale did not prove his debt, nor take any part in the proceedings.

Suit having been afterwards brought against Baldwin by Hale, the indorsee and holder of the note, and still, as originally, a citizen of Vermont, the question was whether the certificate was a bar to the action.

The court below ruled that it was not, and the correctness of the ruling was now before this court on error.

Messrs. Hutchins & Wheeler for the plaintiff in error.

Mr. F. A. Brooks for the creditor, Hale.

Mr. Justice CLIFFORD, after stating the case, delivered the opinion of the court:—

Contract was made in Boston and was to be performed at the place where it was made, and upon that ground it is contended by the defendant that the certificate of discharge is a complete bar to the action. But the case shows that the plaintiff was a citizen of Vermont, and inasmuch as he did not prove his debt against the defendant's estate in insolvency, nor in any manner become a party to those proceedings, he insists that the certificate of discharge is a matter *inter alios*, and wholly insufficient to support the defence.

Adopting the views of the court in *Scribner et al. v. Fisher*, 2 Gray, 48, the defendant concedes that the law is so, as between citizens of different States, except in cases where it appears by the terms of the contract that it was made and must be performed in the State enacting such insolvent law. Where the contract was made and is by its terms to be performed in the State in which the certificate of discharge was obtained, the argument is, that the discharge is entirely consistent with the contract, and that the certificate operates as a bar to the right of recovery everywhere, irrespective of the citizenship of the promisee. Plaintiff admits that a majority of the Supreme Court of Massachusetts, in the case referred to, attempted to maintain that distinction, but he insists that it is without any foundation in principle, and that the decisions of this court in analogous cases are directly the other way.

Controversies involving the constitutional effect and operation of State insolvent laws have frequently been under consideration in this court, and unless it be claimed that constitutional questions must always remain open, it must be conceded, we think, that there are some things connected with the general subject that ought to be regarded as settled and forever closed.

State legislatures have authority to pass a bankrupt or insolvent law, provided there be no act of Congress in force establishing a uniform system of bankruptcy, conflicting with such law; and, provided the law itself be so framed that it does not impair the obligation of contracts. Such was the decision of this court in *Sturges v. Crowninshield*, 4 Wheat. 122, and the authority of that decision has never been successfully questioned. Suit was brought in that case against the defendant as the maker of two promissory notes. They were both dated at New York, on the 22d day of March, 1811, and the defendant pleaded his discharge under an act for the benefit of insolvent debtors and their creditors, passed by the legislature of New York subsequently to the date of the notes in controversy. Contracts in that case, it will be observed, were made prior to the passage of the law, and the court held, for that reason, that the law, or that feature of it, was unconstitutional and void, as impairing the obligation of contracts within the meaning of the Constitution of the United States. Suggestion is made that the ruling of the court in the case of *McMillan v. McNeill*, 4 Wheat. 209, decided at the same term, asserts a different doctrine, but we think not, if the facts of the case are properly understood.

Recurring to the statement of the case, it appears that the contract was made in Charleston, in the State of South Carolina, and it is true that both parties resided there at the time the contract was made, but the defendant subsequently removed to New Orleans, in the State of Louisiana, and it was in the latter State where he obtained the certificate of discharge from his debts. He was also one of a firm doing business in Liverpool, and a commission of bankruptcy had been issued there, both against him and his partner, and they respectively

obtained certificates of discharge. Suit was brought in the District Court for the District of Louisiana, and the defendant pleaded those certificates of discharge in bar of the action, and the plaintiff demurred to the plea. Under that state of the case and of the pleadings, the court held that the certificate of discharge obtained in the State of Louisiana was no defence to the suit, and very properly remarked that the circumstance that the State law was passed before the debt was contracted made no difference in the application of the principle. Bearing in mind that the plaintiff was a citizen of South Carolina, and that the contract was made there, it is obvious that the remark of the court is entirely consistent with the decision in the former case.

Secondly, the court also held that a discharge under a foreign bankrupt law was no bar to an action in the courts of the United States, on a contract made in this country. Speaking of that case, Mr. Justice Johnson afterwards remarked that it decided nothing more than that insolvent laws have no extraterritorial operation upon the contracts of other States, and that the anterior or posterior character of the law with reference to the date of the contract makes no difference in the application of that principle. Eight years later the question, in all its phases, was again presented to this court, in the case of *Ogden v. Saunders*, 12 Wheat. 213, and was very fully examined.

Three principal points were ruled by the court. First, the court held that the power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States did not exclude the right of the States to legislate on the same subject, except when the power had actually been exercised by Congress, and the State laws conflicted with those of Congress. Secondly, that a bankrupt or insolvent law of any State which discharges both the person of the debtor and his future acquisitions of property, was not a law impairing the obligation of contracts so far as respects debts contracted subsequent to the passage of such law. Thirdly, but that a certificate of discharge under such a law cannot be pleaded in bar of an action brought by a citizen of another State in the courts of the United States, or of any other State than that where the discharge was obtained. Much diversity of opinion, it must be admitted, existed among the members of the court on that occasion, but it is clear that the conclusions to which the majority came were in precise accordance with what had been substantially determined in the two earlier cases to which reference has been made. Misapprehension existed, it seems, for a time, whether the second opinion delivered by Mr. Justice Johnson in that case was, in point of fact, the opinion of a majority of the court, but it is difficult to see any ground for any such doubt. Referring to the opinion, it will be seen that he states explicitly that he is instructed to dispose of the cause, and he goes on to explain that the majority on the occasion is not the same as that which determined the general question previously considered. Ample authority exists for regarding that opinion as the opinion of the court, independently of what appears in the pub-

lished report of the case. When the subsequent case of *Boyle v. Zacharie et al.*, 6 Pet. 348, was first called for argument, inquiry was made of the court whether the opinion in question was adopted by the other judges who concurred in the judgment of the court. To which Marshall, C. J., replied, that the judges who were in the minority of the court upon the general question concurred in that opinion, and that whatever principles were established in that opinion were to be considered no longer open for controversy, but the settled law of the court. Judge Story delivered the unanimous opinion of the court in that case during the same session, and in the course of the opinion he repeated the explanations previously given by the Chief Justice. *Boyle v. Zacharie et al.*, 6 Pet. 648. Explanations to the same effect were also made by the present chief justice in the case of *Cook v. Moffat et al.*, 5 How. 310, which had been ruled by him at the circuit. He had ruled the case in the court below, in obedience to what he understood to be the settled doctrine of the court, and a majority of the court affirmed the judgment. Acquiescing in that judgment as a correct exposition of the law of the court, he nevertheless thought it proper to restate the individual opinion which he entertained upon the subject, but before doing so, he gave a clear and satisfactory exposition of what had previously been decided by the court. Those remarks confirm what had at a much earlier period been fully explained by the former Chief Justice and his learned associate. Taken together, these several explanations ought to be regarded as final and conclusive. Assuming that to be so, then, it was settled by this court, in that case, — 1. That the power given to the United States to pass bankrupt laws is not exclusive. 2. That the fair and ordinary exercise of that power by the States does not necessarily involve a violation of the obligation of contracts, *multo fortiori* of posterior contracts. 3. But when in the exercise of that power the States pass beyond their own limits and the rights of their own citizens, and act upon the rights of citizens of other States, there arises a conflict of sovereign power and a collision with the judicial powers granted to the United States which renders the exercise of such a power incompatible with the rights of other States, and with the Constitution of the United States. Saunders, a citizen of Kentucky, brought suit in that case against Ogden, who was a citizen of Louisiana at the time the suit was brought. Plaintiff declared upon certain bills of exchange drawn by one Jordan, at Lexington, in the State of Kentucky, upon Ogden, the defendant, in the city of New York, where he then resided. He was then a citizen of the State of New York, and the case shows that he accepted the bills of exchange at the city of New York, and that they were subsequently protested for non-payment.

Defendant pleaded his discharge under the insolvent law of New York, passed prior to the date of the contract. Evidently, therefore, the question presented was, whether a discharge of a debtor under a State insolvent law was valid as against a creditor or citizen of another

State, who had not subjected himself to the State laws otherwise than by the origin of the contract, and the decision in express terms was, that such a proceeding was "incompetent to discharge a debt due a citizen of another State." Whenever the question has been presented to this court since that opinion was pronounced, the answer has uniformly been that the question depended upon citizenship. Such were the views of the court in *Suydam et al v. Broadnax et al.*, 14 Pet. 75, where it was expressly held that a certificate of discharge cannot be pleaded in bar of an action brought by a citizen of another State in the courts of the United States, or of any other State than that where the discharge was obtained. Undoubtedly a State may pass a bankrupt or insolvent law under the conditions before mentioned, and such a law is operative and binding upon the citizens of the States, but we repeat what the court said in *Cook v. Moffat et al.*, 5 How. 308, that such laws "can have no effect on contracts made before their enactment, or beyond their territory." Judge Story says, in the case of *Springer v. Foster et al.*, 2 Story, C. C. 387, that the settled doctrine of the Supreme Court is, that no State insolvent laws can discharge the obligation of any contract made in the State, except such contracts as are made between citizens of that State. He refers to the case of *Ogden v. Saunders* to support the proposition, and remarks, without qualification, that the doctrine of that case was subsequently affirmed in *Boyle v. Zacharie*, where there was no division of opinion. In the last-mentioned case he gave the opinion of the court, and he there expressed substantially the same views. Confirmation of the fact that such was his opinion may be found both in his Commentaries on the Constitution and in his treatise entitled *Conflict of Laws*. His view as to the result of the various decisions of this court is, that they establish the following propositions: 1. That State insolvent laws may apply to all contracts within the State between citizens of the State. 2. That they do not apply to contracts made within the State between a citizen of the State and a citizen of another State. 3. That they do not apply to contracts not made within the State. 2 Story on Const. § 1390 (3d edition), p. 281; Story on Conf. L., § 341, p. 573.

Chancellor Kent also says that the discharge under a State law is not effectual as against a citizen of another State who did not make himself a party to the proceedings under the law. 2 Kent Com. (9th ed.), p. 503. All of the State courts, or nearly all, except the Supreme Court of Massachusetts, have adopted the same view of the subject, and that court has recently held that a certificate of discharge in insolvency is no bar to an action by a foreign corporation against the payee of a note, who indorsed it to the corporation in blank before its maturity, although the note itself was executed and made payable in that State by a citizen of the State. Repeated decisions have been made in that court, which seem to support the same doctrine. *Savoie v. Marsh*, 10 Met. 594; *Braynard v. Marshall*, 8 Pick. 196. But a majority of the court held, in *Scribner et al. v. Fisher*, 2 Gray, 43, that

if the contract was to be performed in the State where the discharge was obtained, it was a good defence to an action on the contract, although the plaintiff was a citizen of another State and had not in any manner become a party to the proceedings. Irrespective of authority it would be difficult if not impossible to sanction that doctrine. Insolvent systems of every kind partake of the character of a judicial investigation. Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. Common justice requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence. *Nations et al. v. Johnson et al.*, 24 How. 203; *Boswell's Lessee v. Otis et al.* 9 How., 350; *Oakley v. Aspinwall*, 4 Comst. 514.

Regarded merely in the light of principle, therefore, the rule is one which could hardly be defended, as it is quite evident that the courts of one State would have no power to require the citizens of other States to become parties to any such proceeding. *Suydam et al. v. Broadnax et al.*, 14 Pet. 75. But it is unnecessary to pursue the inquiry, as the decisions of this court are directly the other way; and so are most of the decisions of the State courts. *Donnelly v. Corbett*, 3 Seld. 500; *Poe v. Duck*, 5 Md. 1; *Anderson v. Wheeler*, 25 Conn. 607; *Felch v. Bugbee et al.*, 48 Me. 9; *Demerit v. Exchange Bank*, 10 Law Rep. (N. S.) 606; *Woodhull v. Wagner*, Bald. C. C. 300.

Insolvent laws of one State cannot discharge the contracts of citizens of other States, because they have no extraterritorial operation, and consequently the tribunal sitting under them, unless in cases where a citizen of such other State voluntarily becomes a party to the proceeding, has no jurisdiction in the case. Legal notice cannot be given, and consequently there can be no obligation to appear, and of course there can be no legal default. The judgment of the Circuit Court is therefore affirmed with costs. Judgment accordingly.¹

¹ The U. S. Supreme Court has since frequently reiterated the doctrine that a discharge under a State insolvent law cannot affect non-residents. *Baldwin v. Bank of Newbury*, 1 Wall. 234; *Gilman v. Lockwood*, 4 Wall. 409; *Denny v. Bennett*, 128 U. S. 489; *Cole v. Cunningham*, 133 U. S. 107, 115. In *Denny v. Bennett*, the reason of the rule is stated (p. 498). "The objection to the extraterritorial operation of a State insolvent law is that it cannot, like the bankrupt law passed by Congress under its constitutional grant of power, release all debtors from the obligation of the debt. The authority to deal with the property of the debtor within the State, so far as it does not impair the obligation of contracts, is conceded." This passage was quoted with approval in *Brown v. Smart*, 145 U. S. 454.

It has been generally supposed that the doctrine rested upon principles drawn from the Constitution of the United States. In *Phenix Nat. Bank v. Batcheller*, 151 Mass. 589, involving the same question as *Baldwin v. Hale*, HOLMES, J., said (p. 591):—

"The often repeated view of the Supreme Court of the United States is, that discharges like the present are void for want of jurisdiction, and that statutes purporting to authorize them are beyond the power of the States to pass. *Baldwin v. Hale*, 1 Wall. 223, 233; *Baldwin v. Bank of Newbury*, 1 Wall. 234; *Gilman v. Lockwood*, 4 Wall. 409; *Denny v. Bennett*, 128 U. S. 489, 497; *Cole v. Cunningham*, 133 U. S. 107, 115. Whether that court would regard a decision to the contrary by a State court as subject

PULLEN v. HILLMAN.

SUPREME JUDICIAL COURT OF MAINE, DECEMBER 16, 1891.

[Reported in 84 Maine, 129.]

ASSUMPSIT upon a promissory note given by the defendant at Monson, Piscataquis County, March 31, 1888, payable to the plaintiff, then a resident of the same town, at the Kineo National Bank of Dover, in said county. The writ is dated August 30, 1890. The plaintiff removed April 15, 1889, from the State to New York, where he has ever since been a citizen of that State, residing at Cortland.

After the plaintiff's removal from the State and on the ninth day of January, 1890, the defendant obtained a discharge in the court of in-

to review by them upon constitutional grounds, does not appear very clearly from any language of theirs which has been called to our attention, unless it be the following, repeated in *Baldwin v. Hale*, 1 Wall. 223, 231, from *Ogden v. Saunders*, 12 Wheat. 213, 369: "But when, in the exercise of that power, the States pass beyond their own limits, and the rights of their own citizens, and act upon the rights of citizens of other States, there arises a conflict of sovereign power, and a collision with the judicial powers granted to the United States, which renders the exercise of such a power incompatible with the rights of other States and with the Constitution of the United States." This is somewhat emphasized as the deliberate view of the court, not only by its original mode of statement, but by their adhesion to it after the dissent of Chief Justice Taney in *Cook v. Moffat*, 5 How. 295, 310. See *Scribner v. Fisher*, 2 Gray, 43, 47.

"This language certainly gives the impression that our decision would be regarded as subject to review, possibly on the ground of an implied restriction on the power to pass insolvent laws reserved to the States (*Denny v. Bennett*, 128 U. S. 489, 498); possibly on the ground that the discharge would impair the obligation of contracts with persons not within the jurisdiction (*Cook v. Moffat*, 5 How. 295, 308); possibly by reason of the Fourteenth Amendment (*Pennoyer v. Neff*, 95 U. S. 714); possibly on some vaguer ground. We feel the force of the reasoning quoted from *Stoddard v. Harrington*, 100 Mass. 87, 89, but that case did not profess to weaken the authority of *Kelley v. Drury*, and, moreover, the question which we are now considering is not what would be our own opinion, but what seems to be the opinion of the Supreme Court of the United States.

"The decision in *Kelley v. Drury* did not go upon any nice inquiry whether it was subject to review, but upon the ground that this court deferred to the decision of the Supreme Court of the United States, that discharges like the present were not binding outside the jurisdiction, and that, this being so, a discrimination should not be made in favor of our citizens in proceedings in the State court in distinction from proceedings in the courts of the United States."

Whatever the basis of the doctrine, it is uniformly followed by the State courts. The numerous cases before 1893 are collected in 6 Harv. L. Rev. 349. Later cases are *Silverman v. Lessor*, 88 Me. 599; *Pattee v. Paige*, 163 Mass. 352; *Chase v. Henry*, 166 Mass. 577, 168 Mass. 28; *Bergner & Engel Brewing Co. v. Dreyfus*, 172 Mass. 154. In *Chase v. Henry*, it was held (three judges dissenting) that a discharge under the State law did not bar a debt due to a partnership, of which one member was a citizen of another State. In *Bergner & Engel Brewing Co. v. Dreyfus* it was held (Field, C. J., dissenting) that such a discharge did not bar a debt due to a corporation chartered by another State, though carrying on business in Massachusetts.

A State discharge bars a debt due to a citizen of the same State, although he holds the claim as trustee for citizens of another State. *Wade v. Sewell*, 56 Fed. Rep. 129.

solvency, upon his petition filed in that court June 3, 1889. This discharge was pleaded in bar of the plaintiff's action. It was admitted that the plaintiff did not prove his debt in the insolvent court nor appear in any of its proceedings.

Henry Hudson, for plaintiff.

J. F. Sprague, for defendant.

Counsel cited : *Scribner v. Fisher*, 2 Gray, 43 ; *Brigham v. Henderson*, 1 Cush. 430 ; *Converse v. Bradley*, Ib. 434 ; *Stoddard v. Harrington*, 100 Mass. 88 ; *Brown v. Bridge*, 106 Mass. 563.

EMERY, J. The contract which is the subject of this action was made within this State between citizens of this State, and was to be performed within this State. Subsequently, the promissor, the defendant, after regular proceedings in the proper court of insolvency in this State, was granted by that court a discharge from all his debts under R. S., c. 70, § 44. This discharge was properly pleaded in bar of this action, and it is conceded that it would be an effectual bar, if the promisee, the plaintiff, who was a citizen of this State at the time of making the contract, had also been a citizen of this State at the time of the proceedings in the court of insolvency. But the plaintiff after the making of the contract, and before the beginning of the insolvency proceedings, had changed his residence from Maine to New York, and had become a citizen of the latter State and had not since been in Maine. He did not prove his claim under this contract in the insolvency court, nor in any way appear therein.

It is urged that, as the contract was made in Maine, to be performed in Maine, and both parties were citizens of Maine at the time, they must be held to have contracted with reference to the then existing insolvency law of Maine, which provided for this discharge from the contract. It is argued that the insolvent law should be read into the contract, and that therefore the contract must be held to stipulate for such a discharge as is here pleaded.

→ We think, however, the question is not one of the interpretation of a contract or statute, but is one of jurisdiction. Did the court of insolvency have the jurisdiction to discharge the defendant from this contract ?

After much discussion by courts and jurists, and after some conflict of opinion, it must now be considered fully and firmly established as a general proposition that a State cannot give its courts any jurisdictional power to discharge a citizen of such State from his obligation to a citizen of another State, when the latter has not in any way submitted himself or his claim to such court. This proposition is not modified by the circumstance that the contract was made and was to be performed in the State in which the debtor resides. The place of the citizenship of the parties, not the place of the making or performing the contract, defines the jurisdiction of the court. All this is now so well settled by authority, that it is not advisable to occupy space in repeating or even epitomizing the reasoning by which the courts finally

reached this conclusion. The citation of a few cases out of many should be sufficient. *Felch v. Bugbee*, 48 Me. 9; *Hills v. Carlton*, 74 Me. 156; *Phoenix Bank v. Bacheller*, 151 Mass. 589; *Baldwin v. Hale*, 1 Wall. 223; *Gilman v. Lockwood*, 4 Wall. 409; *Denny v. Bennett*, 128 U. S. 489.

Does the additional circumstance in this case, that the plaintiff was a citizen of this State at the date of the contract, though not at the date of the insolvency proceedings, give the court of insolvency jurisdiction over his claim under this contract? To so hold, is to hold that one who was a citizen of this State when he acquired here contractual rights, choses in action, against another citizen of this State leaves them behind him in this State subject to be discharged by the courts of this State without notice to him after he has become a citizen of another State. It is to hold that he, who was once a citizen of this State, cannot remove himself and his property from its jurisdiction. It is to hold, that a citizen of another State coming into this State and making contracts here, to be performed here, has greater immunities than a citizen of our own State. Neither reason nor authority leads us to such a conclusion.

A State may indeed grant its courts jurisdiction over lands and goods within its limits, though the owner may reside beyond those limits. Such objects are visible and tangible, and though the title to them may follow the owner, the thing, the substance, is within the State. They have a situs. They can be taxed where they are situated. In such cases the owner may be presumed to have left such property in the possession of a local tenant or agent. But even then, the specific property to be affected by the judgment of the court must be attached upon process, and such notice given as is feasible.

Contractual rights, obligations, mere choses in action, however, are not visible nor tangible, nor local. They have no situs. They do not exist as things, as substances, within any territorial limits. They follow the person of the creditor. They are his wherever he lives. *Saunders v. Weston*, 74 Me. 85. Even the taxing power of the State in which the debtor resides cannot reach them. Only the State of the creditor's residence can deal with them, at least during the lifetime of the creditor. *Osgood v. Maguire*, 61 N. Y. 524; *Bond Tax Cases*, 15 Wall. 300; *Tappan v. Bank*, 19 Wall. 490. The only court, therefore, that can effectually discharge such a claim is the court that has jurisdiction over the person of the creditor himself. But unless the creditor voluntarily submits to the jurisdiction of the court, by taking some part in the proceedings before it, jurisdiction can only be acquired by service of process upon him within the territorial limits of the State establishing the court. Beyond those limits, no process of any court has any force in acquiring jurisdiction of the person. This proposition is firmly settled by authority as well as by reason. *Lovejoy v. Allen*, 33 Me. 414; *Baldwin v. Hale*, 1 Wall. 223; *Pennoyer v. Neff*, 95 U. S. 714.

Ability to serve process within the State is, therefore, the test of the court's power to acquire jurisdiction in any proceeding. If at the beginning of the insolvency proceedings the process of the court of insolvency could have been served on the plaintiff within the State, the court could have acquired jurisdiction over him by such service. The situation at that time, not at the date of the contract, is the criterion. If the plaintiff was then a citizen of this State, he could have been served with process and subjected to the jurisdiction of the court, although he may never before have been within the State, and although the contract may have been made, and was to be performed in another State. So much will be conceded by the defendant. But it follows, that if the plaintiff was not then a citizen of this State (at the time of the insolvency proceedings), no process could have reached him, and he could not be subjected to the court's jurisdiction even though for all his life before he may have resided within the State.

The defendant's counsel strenuously urges that such a conclusion will work great hardship upon a debtor by enabling his home creditors to avoid his insolvency proceedings by removing from the State. If this be a hardship, the remedy is with Congress in the enactment of a uniform bankrupt law for all the States. The court cannot usurp the power or jurisdiction it does not have.

Counsel also relies upon *Stoddard v. Harrington*, 100 Mass. 88, and upon some dicta in later opinions of the United States Supreme Court. The dicta have little weight, as the precise question was evidently not in the mind of the justices writing the opinions.

The length of this opinion shows our respect for the eminent court which pronounced the judgment in *Stoddard v. Harrington*, but we think that decision cannot be sustained, and that it must be overruled when the same question is again presented to that court. On the other hand, our conclusion is in harmony with that reached by the courts of New Hampshire and Vermont upon the same question. *Norris v. Atkinson*, 64 N. H. 87; *Roberts v. Atherton*, 60 Vt. 563.

*Defendant defaulted.*¹

LOWENBERG v. LEVINE.

SUPREME COURT OF CALIFORNIA, FEBRUARY 4, 1892.

[Reported in 93 California, 2, 5.]

DE HAVEN, J. Action upon a money judgment recovered by plaintiff against defendant in a court of general jurisdiction in the territory of Montana while plaintiff and defendant were residents of that territory, and upon a contract made and to be performed there.

¹ In *Cole v. Cunningham*, 133 U. S. 107, 115, Fuller, C. J., in delivering the opinion of the court, said: "State insolvent laws are . . . binding upon such persons as were citizens of the State at the time the debt was contracted."

Subsequently to the rendition of this judgment, the defendant filed in the Superior Court of the city and county of San Francisco his petition in insolvency, and such proceedings were thereafter had in the matter that upon August 14, 1888, the court duly made and entered its decree discharging plaintiff from all his debts and liabilities. At the date of this decree, and during the entire time of the pendency of these insolvency proceedings, both plaintiff and defendant were residents of this State. In his answer, the defendant pleads this decree in insolvency as a bar to this action. The case was submitted to the court below upon an agreed statement of facts showing the matters hereinbefore stated, and in addition thereto the following facts: "That in the schedule of indebtedness of defendant, Levine, filed with said petition in insolvency, was set forth, as required by law, a statement of the judgment rendered against him and in favor of the plaintiff, Lowenberg, by the District Court of the third judicial district of the territory of Montana, in and for Lewis and Clarke County, as set forth in plaintiff's complaint; that said plaintiff, Lowenberg, never filed a verified or other statement of his claim and demand in said proceedings in involuntary insolvency, or in any other manner whatever participated in any of the proceedings connected therewith; but such failure to participate therein was due to no neglect, default, or omission on the part of the defendant, Levine."

The court below gave judgment for the plaintiff, and the defendant appeals.

The only question presented in the record before us is, whether, in view of the facts as above stated, the decree discharging defendant from his debts and liabilities is a bar to this action.

It is claimed by the appellant that as the parties hereto were resident citizens of this State at the time when the insolvency proceedings were begun, and until their completion, the decree therein discharging him from all his debts is conclusive upon the plaintiff and is a bar to this action, and that the binding force of such decree is in no wise affected by the fact that the judgment sued upon was recovered in the territory of Montana, and is based upon a contract made and to be performed there. In support of this proposition, counsel for appellant rely upon *Felch v. Bugbee*, 48 Me. 9, 77 Am. Dec. 203; *Hawley v. Hunt*, 27 Iowa, 303, 1 Am. Rep. 273; *Bedell v. Scranton*, 54 Vt. 493; *Marsh v. Putnam*, 3 Gray, 551. These cases, however, with the exception of *Marsh v. Putnam*, 3 Gray, 551, are not in point, as in each of them, with the one exception stated, the only matter before the court for decision was as to the effect of a discharge in insolvency upon debts held by non-residents of the State in which the discharge was granted, the creditor not having proved his claim in the insolvency proceedings, nor otherwise participated therein; and it was with reference to this question that it was said in those cases that the binding effect of the discharge in insolvency then before the court depended upon the citizenship of the parties, and not upon the place of the

contract. Thus in the case of *Bedell v. Scranton*, 54 Vt. 493, it is said: "The debt attends the *person* of the creditor, and unless he is within the jurisdiction of the court, no discharge granted by it can affect his rights. It is a question of citizenship, and State courts and State laws are powerless to affect the rights of non-resident creditors by any jurisdiction they may have or exercise over the person of the debtor, or by any proceedings *in rem* affecting the debt itself." So, also, in *Hawley v. Hunt*, 27 Iowa, 303, 1 Am. Rep. 273, the only matter before the court was, whether a discharge in insolvency made by the courts of one State would affect non-residents not parties to it; and in holding that it would not, Dillon, C. J., in delivering the opinion of the court, used this language: "I have said that the settled law now is, that a non-resident and non-assenting creditor is not bound by the debtor's discharge under State insolvent laws, no matter where the debt originated or was made payable. In other words, the citizenship of the parties governs, and not the place where the contract was made or where it is to be performed."

There can be no doubt of the correctness of this proposition, when considered in connection with the question which the court had before it. Indeed, it is only the statement of a very familiar principle, which is not at all peculiar to decrees in insolvency proceedings, that no court can render a valid personal judgment against a defendant, or one affecting property which attends or follows his person, without first obtaining jurisdiction of his person. But the rule itself has no application whatever to the facts of this case, as the question here is, not whether the Superior Court, when it made the decree upon which appellant relies, had jurisdiction over the person of respondent, but whether the court was authorized to discharge, by its decree in insolvency, the obligation of the contract made in another State or territory.

Section 53 of the Insolvent Act of this State declares: "A discharge, duly granted under this Act, shall . . . release the debtor from all claims, debts, liabilities, and demands set forth in his schedule, or which were or might have been proved against his estate in insolvency." This language is broad enough to include the debt sued upon in this action; but if the State is without authority to pass an insolvent law affecting the obligations of contracts made without the State, then the general terms of the statute must be restricted, and the act construed as not intended to affect or apply to them. *Danforth v. Robinson*, 80 Me. 466, 6 Am. St. Rep. 224. So that, after all, the real question for decision in this case is as to the power of the State to enact a law having the effect to discharge the obligation of contracts made elsewhere, when the creditor in no wise participates in the proceedings in which the discharge is entered, although he may have been a resident of this State at the time of the insolvency proceedings. This precise question came before the Supreme Court of New York in the case of *Witt v. Follett*, 2 Wend. 457, and was there determined in the nega-

tive; and such seems to be the settled doctrine of the Supreme Court of the United States. In the case of *Cook v. Moffat*, 5 How. 308, that court, while conceding the authority of a State to pass an insolvent law, in the absence of a law of Congress establishing a uniform system of bankruptcy, nevertheless, held that, in view of section 10 of article I. of the Constitution of the United States, which denies to a State the power to pass any law impairing the obligation of contracts, the insolvent law of a State "could have no effect on contracts made before their enactment, or beyond their territory." And in the later case of *Baldwin v. Hale*, 1 Wall. 223, that court, after reviewing the previous cases decided by it as to the effect of State insolvent laws, takes occasion to again state upon what contracts such laws cannot operate, and, in so doing, uses this language: "Undoubtedly a State may pass a bankrupt or insolvent law under the conditions before mentioned, and such a law is operative and binding upon the citizens of the State; but we repeat what the court said in *Cook v. Moffat*, 5 How. 308, that such laws can have no effect on contracts made before their enactment, or beyond their territory."

The rule upon this subject, and the reason upon which it is founded, is thus stated in section 1390 of Story on the Constitution, as the result of all the cases: "The question is now understood to be finally at rest; the State insolvent laws, discharging the obligation of future contracts, are to be deemed constitutional. Still, a very important point remains to be examined, and that is, to what contracts such laws can rightfully apply. The result of the various decisions on this subject is: 1. That they apply to all contracts made within the State between citizens of the State; 2. That they do not apply to contracts made within the State between a citizen of a State and a citizen of another State; 3. That they do not apply to contracts not made within the State. In all these cases it is considered that the State does not possess a jurisdiction co-extensive with the contract over the parties, and therefore that the Constitution of the United States protects them from prospective as well as retrospective legislation. Still, however, if a creditor voluntarily makes himself a party to the proceedings under an insolvent law of a State which discharges the contract, and accepts a dividend declared under such law, he will be bound by his own act, and be deemed to have abandoned this extraterritorial immunity."

In the case of *Marsh v. Putnam*, 3 Gray, 551, cited and relied upon by appellant, a contrary rule was declared. But this case stands alone, and, in our opinion, should not be followed.

The plaintiff not having in any manner participated in the insolvency proceedings had in this State, and relied upon as a bar, and the judgment sued upon having been recovered in Montana upon a contract made there, it results from the foregoing views that the plaintiff is entitled to recover in this action.

Judgment affirmed.

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LOTHROP v. HIGHLAND FOUNDRY COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER 2, 1879—
JANUARY 12, 1880.

[Reported in 128 Massachusetts, 120.]

PETITION in equity to this court, under the Gen. Sts. c. 118, § 16, to stay proceedings in which the court of insolvency had issued a warrant against an insolvent debtor upon the petition of a creditor, which was filed September 16, 1878, under the Gen. Sts. c. 118, § 103, and alleged that the debtor on August 31, 1878, made two mortgages of his personal property to secure the payment of preëxisting debts to the mortgagees, with intent to secure to them a preference, and to defraud his creditors, the debtor being at the time insolvent and having reasonable cause to believe himself insolvent.

The petition to this court alleged that the court of insolvency had no jurisdiction of the case: 1st. Because, at the time of the alleged making of the mortgages, the insolvent laws of Massachusetts were not in force, and the acts complained of were not in violation of any law then of binding force in this Commonwealth. 2d. Because the original petition was defective in not setting forth that either of the mortgagees knew or had reasonable cause to believe that the debtor was insolvent at the time of making the mortgages to them.

The petition to this court was dismissed, with costs, by COLT, J.; and the petitioner appealed to the full court.

T. G. Kent, for the petitioner.

H. J. Boardman & C. Blodgett, for the respondent.

GRAY, C. J. The principal question in this case is whether a conveyance by way of preference, made by an insolvent debtor, in contravention of the provisions of the insolvent laws of the Commonwealth, while the recent bankrupt act of the United States was in force, is a sufficient cause for instituting proceedings in insolvency against the debtor since the repeal of the bankrupt act. This question appears to us to be substantially determined by the judgments heretofore delivered by this court as to the effect of the bankrupt act of 1841 upon the insolvent law of 1838.

The first insolvent law of Massachusetts was passed on April 23, 1838, and took effect on August 1 of the same year. St. 1838, c. 163, § 26. The United States bankrupt act of 1841 was passed on August 19, 1841, and took effect from and after February 1, 1842. U. S. St. August 19, 1841, § 17. By the St. of Massachusetts of 1842, c. 71, it was enacted that the insolvent law of 1838 (except the provision for discharging attachments by giving bond) "shall be suspended so long as the bankrupt law of the United States shall continue in force; provided, that nothing in this act contained shall affect any proceedings which may be pending under the provisions of the act hereby sus-

pending, when this act shall take effect." This statute, though passed on March 3, yet, as it did not expressly prescribe the time when it should go into operation, did not take effect until thirty days afterwards. Rev. Sts. c. 2, § 5. But it was held by this court that the bankrupt act of 1841, by its own force, suspended the operation of all State insolvent laws applicable to like cases; and therefore that proceedings in insolvency instituted on March 3, 1842 (while that bankrupt act was in force, though before the St. of 1842, c. 71, took effect, were unauthorized and void, if the debtor and his property were subject to the operation of the bankrupt act, although no proceedings under that act had been had against him. *Griswold v. Pratt*, 9 Met. 16.

The bankrupt act of 1841 was repealed by act of Congress of March 3, 1843. This court held that an attachment made while the bankrupt act of 1841 was in force, and the insolvent law of 1838 was suspended, was dissolved by an assignment of the debtor's estate under the insolvent law on proceedings instituted after the repeal of the bankrupt act; and Chief Justice Shaw said: "The insolvent law, during its suspension, existed to many purposes. It was suspended only during the existence of another system of paramount authority, designed for the accomplishment of the same purpose, namely, a general and equal distribution of the property. When, therefore, the operation of this suspending law ceased, the original act was reinstated in active operation, and took effect from its original enactment." *Ward v. Proctor*, 7 Met. 318.

In *Atkins v. Spear*, 8 Met. 490, it was contended that certain transfers, assignments, and payments, made by a debtor while the bankrupt act of 1841 was in force and the insolvent law suspended, invalidated a certificate of discharge under proceedings in insolvency commenced after the repeal of the bankrupt act. Mr. Justice Dewey, in delivering the judgment of the court, said that, upon the repeal of the bankrupt act, "the insolvent law of Massachusetts was revived, and with its revival all the limitations and restrictions upon the right to a discharge revived, although the acts had occurred during its suspension;" and that therefore, if the alleged acts of the defendant were within the cases specified in the insolvent law of 1838, or the statutes supplementary thereof, as avoiding a discharge, then they would have that effect, but not otherwise. He then proceeded to examine the various acts relied on, and to show that none of them contravened the provisions of the insolvent laws, — which would have been wholly unnecessary if no acts whatever, done while the bankrupt act was in force and the insolvent laws suspended, could have been deemed to have been prohibited by the insolvent laws.

In *Austin v. Caverly*, 10 Met. 332, Chief Justice Shaw referred to *Ward v. Proctor* and *Atkins v. Spear*, above cited, as establishing that, upon the repeal of the bankrupt act of 1841, "the insolvent law of 1838 went into renewed and active operation, to be construed according to the terms of its original enactment."

It may also be observed that fraudulent conveyances made after the bankrupt act of 1841 was passed, but before it took full effect so as to suspend the operation of State insolvent laws, have been held to afford grounds for impeaching a certificate of discharge obtained, or for allowing the property conveyed to be recovered back by an assignee appointed, under proceedings in bankruptcy instituted after the bankrupt act took full effect. *Swan v. Littlefield*, 4 Cush. 574; *Day v. Bardwell*, 97 Mass. 246, 255, and cases cited.

The recent bankrupt act of the United States was enacted on March 2, 1867, and did not take full effect so as to suspend the operation of the insolvent laws of the Commonwealth, until June 2, 1867. *Day v. Bardwell*, 97 Mass. 246. It was repealed by the U. S. St. of June 7, 1878, which took effect on September 1, 1878. The omission of the legislature of the Commonwealth to make any regulation whatever as to the suspension or the revival of the operation of the insolvent laws, by reason of the contemplated or the actual enactment or repeal of the last bankrupt act, can hardly be explained on any other hypothesis than that it was considered to be settled by the judgments of this court, that no such legislation was necessary, either to suspend the operation of the insolvent laws so long as the bankrupt act continued in force, or to revive the operation of all the provisions of the insolvent laws, as if they had never been suspended, so soon as the bankrupt act was repealed; and that the effect, and the only effect, of the bankrupt act upon the insolvent laws was to suspend, so long as it was in force, the right to institute proceedings under those laws in cases within its provisions.¹ In view of the course of legislative action and of judicial

¹ *Martin v. Berry*, 37 Cal. 208; *Chamberlain v. Perkins*, 51 N. H. 336; *Augsbury v. Crossman*, 10 Hun, 389, acc. *Conf. In re Langley*, 1 B. R. 559. Similarly under the act of 1841, *Larrabee v. Talbott*, 5 Gill, 426.

But under the law of 1898, although, as in the previous act, no proceedings could be begun for some time after the passage of the act, yet because of the express provision of the final paragraph, "This act shall go into full force and effect upon its passage," it has been held that State insolvency laws were at once suspended on July 1, 1898. *Re Brass-Kitter Co.*, 90 Fed. Rep. 651; *In re Curtis*, 91 Fed. Rep. 737; *Harbaugh v. Costello*, 184 Ill. 110; *Parmenter Mfg. Co. v. Hamilton*, 172 Mass. 178.

Proceedings begun under State insolvency laws before a national bankruptcy act takes effect are not affected by it. *Martin v. Berry*, 37 Cal. 208; *Meekins v. Creditors*, 19 La. 497; *Longis v. Creditors*, 20 La. An. 15; *Larrabee v. Talbot*, 5 Gill. 426; *Lavender v. Gosnell*, 43 Md. 153; *Judd v. Ives*, 4 Met. 401. This is expressly so provided in the closing words of the act of 1898.

The fact, however, that a State court has appointed a receiver of a corporation, when a national bankruptcy act is in force does not prevent proceedings in bankruptcy, and the receiver must give up the property. *Re Independent Ins. Co.*, 6 B. R. 169, 260; *Platt v. Archer*, 6 B. R. 465; *Re Merchants' Ins. Co.*, 6 B. R. 43. *Contra*, however, is *Mayer v. Crystal Lake Works*, 14 B. R. 9.

² *Torrens v. Hammond*, 10 Fed. Rep. 900; *Lavender v. Gosnell*, 43 Md. 153, acc.

In Maine an insolvent law was passed in 1878 while the national act was still in force. It was held that the State law took effect on the repeal of the national act, and applied to acts done while the national act was in force. *Palmer v. Hixon*, 74 Me. 447.

In *Ex parte Ziegenfuss*, 2 Ired. 463; *Maltbie v. Hotchkiss*, 38 Conn. 80, 83; and

decision on the subject, it would be most unreasonable to conclude that fraudulent preferences made since the passage of the insolvent laws and of the bankrupt act should not be reached by the provisions of either.

The objection that the petition to the court of insolvency is defective for want of an allegation that the mortgagees knew or had reasonable cause to believe that the debtor was insolvent, cannot be sustained. The dicta of Chief Justice Shaw in *Ex parte Jordan*, 9 Met. 292, on which this objection is founded, were unnecessary to the decision of that case, and are controlled by the opinion subsequently delivered by him in *Thompson v. Stone*, 8 Cush. 103, as well as by the express provision of the St. of 1856, c. 284, § 29, which the Commissioners on the General Statutes indicate no purpose to abrogate. The difference in the language of the different sections of c. 118 of the Gen. Sts. manifests the intention of the legislature that, in order to enable the assignee to maintain an action under § 89 to recover back the property conveyed, it should be necessary to prove knowledge or reasonable cause to believe, on the part of those receiving or benefited by the conveyance, that the debtor was insolvent or in contemplation of insolvency at the time of making it; but that the liability of the debtor to proceedings in insolvency under § 103, like his right to a certificate of discharge under § 87, should depend solely on his own intent and purpose and cause of belief, or, in other words, upon the question whether he, and not upon the question whether any other person, has done an act in fraud of the insolvent laws. And the petition to the court of insolvency in this case is in the form which has been generally used under those statutes. See *Cutler's Insolvent Laws* (3d ed.), 125; (4th ed.) 193.

Decree affirmed.

Reed v. Taylor, 32 Ia. 209, it was held that State laws were not wholly suspended by a national act, and that proceedings might be had under a State law until the jurisdiction of the Federal court had been called into exercise. This ground of decision is clearly wrong. *In re Eames*, 2 Story, 322; *Com. v. O'Hara*, 1 B. R. 87; *Thornhill v. Bank*, 3 B. R. 435, 5 B. R. 367; *Ketcham v. McNamara*, 72 Conn. 709; *Beach v. Miller's Exr.*, 15 La. An. 601; *Van Nostrand v. Carr*, 30 Md. 128; *Griswold v. Pratt*, 9 Met. 16; *Rowe v. Page*, 54 N. H. 190; *E. C. Wescott Co. v. Berry* (N. H.), 45 At. Rep. 352.

But though an insolvent law is entirely suspended as such, some provisions of the statute may still have some effect. In *Re Worcester County*, 102 Fed. Rep. 808, it was held that a provision of the Massachusetts insolvent law giving counties priority entitled counties to priority under § 64 of the bankrupt act providing for priority for debts owing to persons entitled by the laws of the State to priority.

STEELMAN v. MATTIX.

SUPREME COURT OF NEW JERSEY, NOVEMBER TERM, 1873.

[Reported in 36 New Jersey Law, 344.]

VAN SYCKEL, J. This suit was instituted upon a bond executed by Nathan P. Mattix and his sureties, under the second section of the act entitled, "An act abolishing imprisonment on civil process in certain cases." Nix. Dig. 386, p. 9. One of the breaches assigned in the declaration is, that the said Mattix, after he was refused his discharge under the insolvent laws of this State, did not surrender himself to the sheriff, out of whose custody he had been liberated.

To this declaration there is a general demurrer, upon the ground that the bond is void, because the act under which it was given was superseded or suspended by the national bankrupt law.

It is admitted that the authority given to Congress to establish uniform laws on the subject of bankruptcy does not restrict the power of the States over the same subject, until the power of Congress is actually exercised.

Whether the enactment of the national law *ipso facto* nullifies the operation of State laws, or whether proceedings may be instituted and continued under State laws, until proceedings are actually taken under the Federal law, are questions which have been much discussed, but they are not necessarily involved in this case, and, therefore, no opinion will be expressed in regard to them.

The subject is divisible into bankrupt and insolvent laws, but the difficulty of defining with accuracy what belongs to the one and not to the other class is recognized in the principal case. Sturges v. Crowninshield, 4 Wheat. 122.

The line of separation may be an arbitrary one, and without attempting to establish any rule by which laws of this character may be classified, it will be sufficient if we can say with confidence that the act now in question is so far removed from the line of demarcation that its character is not doubtful.

It is an act to abolish imprisonment on civil process in certain cases. It applies to the single instance of involuntary confinement, and its aim and purpose is simply to liberate the person. It has neither the scope, nor does it subserve the end of a bankrupt law. The person who invokes its aid must not necessarily be bankrupt or insolvent — he need only be incarcerated on civil process against his will.

It is true that his property is sequestered and distributed among his creditors, but so it is under the attachment act, the assignment act, and the act applying to the estates of decedents; the distribution of the property is merely incidental, and does not discharge the debt. This was not a proceeding in bankruptcy, and would no more come in

conflict with the law of Congress than a suit prosecuted to judgment and execution; in either case the assignee in bankruptcy would take the debtor's property out of the control of the State court. The power given to Congress over this subject is plenary, and when it has been exercised, all State legislation, and all proceedings in State courts, which actually come in conflict with it, must yield to the paramount authority of the general government. It would seem necessarily to result, that when Congress has constitutionally passed a law upon this subject, State law, designed to accomplish substantially the same purpose, must fall.

Uniformity cannot exist with jurisdiction in the State and federal courts in operation at the same time over the same subject-matter, to secure substantially the same result.

The fact that under certain conditions the State courts are vested with authority to control and administer the debtor's property for the benefit of creditors, is not, of itself, conclusive as to the vitality of the State law.

It is held that a State insolvent law, which supplies the mode of administering insolvent estates under such assignments made by debtors for the benefit of creditors as would be valid at common law, without the aid of any statute, and which could be enforced by a court of equity like any other trust, is not suspended. Hawkins' Appeal, 8 Am. L. R. 205; Beck v. Parker, 65 Penn. 262.

So when a bankrupt act expressly excepts a class of cases, it must have been the intention of Congress not to interfere in such specified class with the laws of the several States. *In re Wintermitz*, 18 Pittsburgh L. J. 61.

This recognizes the corollary that in a case not provided for by the national authority, the force of State legislation is undisturbed, for no conflict can possibly arise between the two jurisdictions.

Our State law in question is of this class, where a debtor, prior to the institution of proceedings in bankruptcy, is imprisoned on civil process issued out of the State court, the federal law furnishes no means of discharging him from confinement, and therefore, if this State law is held to be suspended, the prisoner is without relief, and subject to lifelong incarceration. When the federal law is put into actual operation, the superior title of the assignee in bankruptcy to the property of the debtor would assert itself in the same way that it would prevail over the title of the sheriff acquired by virtue of his executions, in certain specified cases.*

¹ The Poor Debtor laws of Massachusetts continued to be enforced during the existence of the bankruptcy act of 1867, and the provisions for imprisonment of the debtor in case of fraud were held unaffected by the provision of the national act that "no bankrupt should be liable to arrest during the pendency of the proceedings in bankruptcy in any civil action unless the same is founded on some debt or claim from which his discharge would not release him." *Stockwell v. Silloway*, 100 Mass. 287, 105 Mass. 517. Similarly in Pennsylvania, *Scully v. Kirkpatrick*, 79 Pa. 324.

A law giving a creditor a right to prevent his debtor from leaving the State

But if our insolvent laws shall be regarded as bankrupt laws, and it is held that they are superseded or suspended, the act under which this bond is given is still in full force, and the bond is obligatory. Under that construction, it may be questioned whether, while the act of April 15th, 1856, remains upon our statute book, the sheriff could refuse to accept the bond. The condition is, that the debtor shall apply for the benefit of the insolvent laws of this State, and if he fails to be discharged, shall surrender himself to the officer. The undertaking is in the alternative, either to obtain a discharge under a law which is no longer effective, or to return to the condition from which he was released. Failing in the former, he must perform the latter; this obligation is neither to do that which is unlawful or impossible. When application is made to the State court for a discharge, the debtor would be remanded to custody, either because he did not comply with the provisions of the State law, or for the reason that the State court had no power in the premises.

As the pleadings stand, the defendant has failed to comply with the condition of his bond, and the demurrer, therefore, should be overruled, with costs.¹

HAWKINS v. LEARNED.

SUPREME JUDICIAL COURT OF NEW HAMPSHIRE, JUNE TERM, 1874.

[Reported in 54 New Hampshire, 333.]

SARGENT, C. J. The motion to dismiss in this case is founded upon Gen. Stats., c. 167, § 10, as follows: "When, upon representation of the guardian of any insane person or spendthrift, the judge is satisfied that estate of the ward is not sufficient to discharge the just debts due therefrom, he may decree that said estate be set-
remained in force concurrently with a national act. *Gollschalk v. Meyer*, 28 La. An. 885.

An assignment made under insolvent laws of Pennsylvania, the object of these laws being to discharge the debtor from liability to imprisonment only, was held valid though the debtor was subsequently adjudicated a bankrupt under the national act of 1841. *Sullivan v. Hieskill*, *Crabbe*, 525. See also *Ex parte Rank*, *Crabbe*, 493, and *conf. Barber v. Rodgers* 71 Pa. 362. So, under a similar statute in New York, *Berthelon v. Betts*, 4 Hill, 577. See also *Shears v. Solhinger*, 10 Abbott's Prac. n. s. 287. In Rhode Island the law for the relief of poor debtors was held to continue in force after the passage of a national act: *Jordan v. Hale*, 9 R. I. 218; but the insolvent law was held to be suspended, though the debtor was not by its terms discharged from his debts, and the only material difference between it and the law for the relief of poor debtors was that the former relieved the debtor from liability to arrest for any of his debts while the latter only relieved him from liability to arrest for a particular debt. In the matter of *Reynolds*, 8 R. I. 485. This decision seems, however, somewhat discredited by *Jordan v. Hale*, 9 R. I. 218, 222.

¹ *Conf. Barber v. Rodgers*, 71 Pa. 362.

tled as insolvent, and thereupon such proceedings shall be had, decrees made, appeals allowed, suits disposed of, and the accounts of the guardian adjusted, as in the case of insolvent estates of deceased persons."

In this case, it is agreed that the defendant was duly decreed to be an insane person by the Probate Court, and a guardian was appointed. The guardian made the proper representation to the Probate Court, and the defendant's estate was thereupon decreed to be administered as insolvent; and after this, at this term, the guardian appears and moves that this action, which was commenced October 24, 1873, be dismissed in consequence of such proceedings in the Probate Court.

This is the same way a suit would be disposed of in case of a deceased person whose estate was decreed to be administered as insolvent. No action shall be commenced or prosecuted against an administrator after the estate is decreed to be administered as insolvent, but the cause of action may be presented to the commissioner and allowed, with the costs of any action pending at the time of such decree — Gen. Stats., c. 179, § 8; and in such cases no plea is necessary setting forth the decease or the insolvency. When the facts are suggested, and the court is satisfied that such decrees have been made in the court of probate, the actions are discontinued in this court at once.

It is urged in argument that the plaintiffs should be heard upon the question whether the party is insane, etc., but that could not be in this court. The Probate Court is the tribunal selected by law to settle that question; and, when once settled there, it is settled for all other places and all other courts. This must be so from the nature of the case. If it were not so, the same man might be held both sane and insane at the same time. The case of *Jones v. Jones*, 45 N. H. 123, is directly in point, under provisions of the statute precisely like the present, and must control this case.

The authorities cited, that the general bankrupt law of the United States supersedes all State insolvent laws, do not apply. The laws for the settlement of the estates of deceased persons, though they may provide for settling estates in the insolvent course, yet are not regarded as general insolvent laws. It would not be claimed, probably, that the statute for the settlement of the estates of deceased persons in the insolvent course was superseded by the general bankrupt law; and if not, then this would not be, because this statute provides for settling the estates of insane persons in all respects like the settling of the estates of persons deceased.

The motion to dismiss must be granted.

EBERSOLE & MCCARTY v. ADAMS, &c.

COURT OF APPEALS OF KENTUCKY, WINTER TERM, 1873.

[Reported in 10 Bush, 83.]

JUDGE LINDSAY delivered the opinion of the court.

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The petition in this action was framed under the provisions of the act approved March 10, 1856, entitled "An act to prevent fraudulent assignments in trust for creditors and other fraudulent conveyances." It is alleged that the conveyance from Adams and wife to Kirk was made and executed in contemplation of insolvency, and with the design to prefer one or more creditors to the exclusion in whole or in part of others; and under the general prayer for relief the court is authorized to declare that said conveyance operated as an assignment and transfer by Adams of all his property and effects for the benefit of all his creditors, to take possession of such property and effects, and make distribution among the creditors as directed by said act.

To the petition appellees demurred, upon the ground that the act of 1856 is "a State system of bankruptcy," . . . and that it was "superseceded and in effect repealed by the act of Congress of the United States, passed in pursuance of express constitutional power, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867.

The demurrer was sustained, a personal judgment rendered against the debtor Adams, and the petition to the extent that relief was asked against Kirk, under the provisions of the act of 1856 dismissed.

This act is not a bankrupt law nor an insolvent act. It has none of the characteristics of either, except that it provides for the appropriation of the property of the debtor to the payment *pro tanto* of all his creditors.

An assignment or transfer made in contemplation of insolvency, and to prefer creditors, is an act of bankruptcy under the act of Congress; but this fact does not deprive creditors of the right to apply to the State courts for relief, in case they choose to do so. Notwithstanding the Federal Bankrupt Act, the State courts have full and complete power to relieve against all frauds, actual or constructive, except in cases in which a court of bankruptcy has first taken jurisdiction, or where the relief asked in the State courts is subversive of the rights of parties to a pending proceeding in bankruptcy subsequently instituted.

If the act of 1856 be regarded as a State bankrupt law, there is still no reason why the Circuit Court should not enforce it.

State legislatures have the power to pass bankrupt or insolvent laws, provided there be no act of Congress in force establishing a uniform system of bankruptcy conflicting with such law. It was so held by Mr. Justice Johnson of the Supreme Court in the case of *Ogden v. Saunders*, 12 Wheat. 273. And in the subsequent case of *Boyle v.*

Zacharie, 6 Pet. 348, Chief Justice Marshall stated that "the judges who were in the minority of the court upon the general question as to the constitutionality of State insolvent laws, concurred in the opinion of Mr. Justice Johnson in the case of *Ogden v. Saunders*," and hence that that opinion was therefore to be considered as no longer leaving the question open for controversy. The binding force of this decision was again recognized by the Supreme Court in the case of *Baldwin v. Hale*, 1 Wall. 223. Judge Cooley, after reviewing all the cases bearing upon this subject, states the settled law to be that "the several states have power to legislate on the subject of bankruptcy and insolvent laws, subject, however, to the authority conferred upon Congress by the Constitution to adopt a uniform system of bankruptcy, which authority, when exercised, is permanent, and State enactments in conflict with those of Congress upon the subject must give way."

The State law under consideration does not conflict with the law of Congress. Except to the extent that the distribution by the State court of the assets of the debtor's estate relieves him from liability to his creditors, his obligation and the right of the creditors still to look to him and to his future acquisitions for such amounts as may remain unpaid continue unimpaired.

All the creditors may make themselves parties to the proceeding in the State court, and the assets of the debtor are marshalled and distributed substantially in the same manner as the act of Congress provides shall be done in a proceeding in bankruptcy.

The State law being in every essential consistent with the act of Congress, there is no reason why the latter act shall be regarded as superseding or repealing the former. The court below erred in sustaining the demurrer, and in dismissing appellants' petition.

The judgment is reversed, and the cause remanded with instructions to overrule the demurrer, and for further proceedings consistent with this opinion.

The appeal is dismissed as to Mrs. Adams, it not appearing that appellants have any claim against her, and no reason being shown for making her a party either to the proceedings in the Circuit Court or to this appeal.¹

¹ *Linthicum v. Fenley*, 11 Bush, 131 acc.

Statutes making a preference operate as a general assignment or as ground for a receiver of all the debtor's property exist also in New Mexico, Tennessee, Wisconsin.

In *Tobin v. Trump*, 3 Brewst. 288, it was held that a national bankruptcy act superseded a law of Pennsylvania authorizing the attachment and transfer to trustees of all the property of a debtor who absconded or concealed himself with intent to defraud.

A receiver may be appointed by a State court of an insolvent corporation, though proceedings in bankruptcy might have been begun, and unless the corporation is afterwards put into bankruptcy the receiver may distribute the assets of the corporation. *Chandler v. Siddle*, 10 B. R. 236; *State v. Superior Court*, 20 Wash. 545. See also *Watson v. Citizens' Savings Bank*, 5 S. C. 159. Nor is requesting or allowing the appointment of a receiver in itself an act of bankruptcy under the present statute. *Vaccaro v. Security Bank*, 103 Fed. Rep. 436 (C. C. A.).

EDWARD M. SHEPARDSON'S APPEAL FROM PROBATE.

FEBRUARY TERM, 1869.

[Reported in 36 Connecticut, 23.]

CARPENTER, J. Proceedings were instituted against the appellant under the insolvent laws of this State, and thereupon a trustee was appointed by the court of probate. From that decree an appeal was taken, and the Superior Court affirmed the decree. The appellant now seeks to reverse that judgment by motion in error.

The objection to the validity of that decree is based upon the claim that the statute authorizing it had been superseded by the operation of the bankrupt act of the United States, then and now in force. That act applies only to cases where the debtor is owing debts provable under the act "exceeding the amount of three hundred dollars." Sections 11 and 39 of the act. It does not appear in this case that the debts of the appellant exceed that amount. The case therefore does not appear to be within the purview of the act of Congress.

We have no occasion to presume either that the debts are more or less than that amount. If less, it is clear that the law, so far as it respects this case, is unaffected by the bankrupt act.

Before we can hold that the proceedings are erroneous, it ought to appear affirmatively that they are more. Until then there is no conflict of laws. The State law is operative to some extent and for some purposes. It is clearly operative in all cases which are not within the provisions of the United States law. So far as appears this is, or may be, a case of that description. We therefore see no error in the judgment complained of.

In this opinion HINMAN, C. J., and BUTLER, J., concurred.

PARK, J. The record does not disclose whether or not the insolvent owes debts in the aggregate to an amount less than the sum of three hundred dollars. If he owes more than that amount, the majority of the court concede that the Probate Court had no jurisdiction of the case, for the bankrupt act suspends the insolvent act in cases of involuntary insolvency, where the insolvent owes debts more in the aggregate than that amount. The question then is one of jurisdiction; and the record leaves it in doubt whether or not the Probate Court had jurisdiction. Now it has repeatedly been held by this court that the jurisdiction of a probate court must affirmatively appear and that no presumption exists in its favor.

In the case of Potwine's Appeal from Probate, 31 Conn. R., 381, Judge Butler says: "Courts of probate have a special and limited jurisdiction. Their proceedings cannot be sustained by presumption, and their records must show an explicit finding of all necessary juris-

ditional facts." The following cases are to the same effect. *Coit v. Havens*, 30 Conn. R., 190; *Sears v. Terry*, 26 Conn. R., 273.

I cannot agree with the majority of the court on this question.¹

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MAYER ET AL v. HELLMAN.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1875.

[Reported in 91 United States, 496.]

ERROR to the Circuit Court of the United States for the Southern District of Ohio.

The plaintiff in the court below is assignee in bankruptcy of Bogen and others, appointed in proceedings instituted against them in the District Court of the United States for the Southern District of Ohio; the defendants are assignees of the same parties, under the assignment law of the State of Ohio; and the present suit is brought to obtain possession of property which passed to the latter under the assignment to them. The facts as disclosed by the record, so far as they are material for the disposition of the case, are briefly these: On the 3d of December, 1873, at Cincinnati, Ohio, George Bogen and Jacob Bogen, composing the firm of G. & J. Bogen, and the same parties with Henry Müller, composing the firm of Bogen & Son, by deed executed of that date, individually and as partners, assigned certain property held by them, including that in controversy, to three trustees, in trust for the equal and common benefit of all their creditors. The deed was delivered upon its execution, and the property taken possession of by the assignees.

By the law of Ohio, in force at the time, when an assignment of property is made to trustees for the benefit of creditors, it is the duty of the trustees, within ten days after the delivery of the assignment to them, and before disposing of any of the property, to appear before

¹ In *Geery's Appeal*, 43 Conn. 289, the court sustained involuntary proceedings under the State insolvent law against a corporation it not appearing that the corporation had committed an act of bankruptcy under the national act nor that a sufficient number of creditors wished to institute proceedings in bankruptcy. The court say (p. 298): "So far as that act assumes and takes jurisdiction of the parties and of the subject-matter, just so far is the jurisdiction of the State courts excluded. On the other hand we contend that in respect to all persons and matters over which the bankrupt act declines to take jurisdiction, the statute of this State remains in full force." But this doctrine was held, if sound under the act of 1867, not sound under the act of 1898 in *Ketcham v. McNamara*, 72 Conn. 709. In that case an assignment under the State law was held to give the assignee not even a voidable title, though no bankruptcy proceedings had been begun.

In the early case of *Clarke v. Ray*, 1 H. & J. 318, 320, it was said: "The legislatures of the several States have competent authority to pass laws for the relief of all persons who are not comprehended within the act of Congress."

See also *Simpson v. City Savings Bank*, 56 N. H. 466.

the probate judge of the county in which the assignors reside, produce the original assignment, or a copy thereof, and file the same in the Probate Court, and enter into an undertaking payable to the State, in such sum and with such sureties as may be approved by the judge, conditioned for the faithful performance of their duties.

In conformity with this law, the trustees, on the 13th of December, 1873, within the prescribed ten days, appeared before the probate judge of the proper county in Ohio, produced the original assignment, and filed the same in the Probate Court. One of the trustees having declined to act, another one was named in his place by the creditors, and appointed by the court. Subsequently the three gave an undertaking with sureties approved by the judge, in the sum of \$500,000, for the performance of their duties, and then proceeded with the administration of the trust under the direction of the court.

On the 22d of June of the following year, more than six months after the execution of the assignment, the petition in bankruptcy against the insolvents was filed in the District Court of the United States, initiating the proceedings in which the plaintiff was appointed their assignee in bankruptcy. As such officer, he claims a right to the possession of the property in the hands of the defendants under the assignment to them. Judgment having been rendered against them, they sued out this writ of error.

Mr. W. T. Forrest, for the plaintiffs in error.

Deeds of trust or assignments made in good faith, and for the common benefit of all the creditors of a debtor, are in aid of the provisions of the Bankrupt Law, and not contrary to its spirit. They have been said, "to carry out the equitable provisions of a bankrupt law through the medium of a private contract," and are a cheap, expeditious, and convenient mode of arriving at the objects intended by that law. *Sedgwick v. Place*, 1 Nat. Bank. Reg. 204; *Tiffany v. Lucas*, 15 Wall. 410; *Clark v. Iselin*, 21 Wall. 360; *Michael v. Post*, id. 398; *Langley v. Perry*, 2 Nat. Bank. Reg. 180. The statute of Ohio, entitled "An Act regulating the mode of administering assignments in trust for the benefit of creditors," has none of the distinctive features of an insolvent or a bankrupt law. It does not purport or attempt to discharge the debtor either from arrest or imprisonment, or to free him from future liability. His after-acquired property is liable to his creditors to the same extent in every particular as if he had not made an assignment in trust for his creditors. Deeds of trust are not the creatures of that law. They existed in Ohio, and were constantly recognized and used for fifty years before it was passed. They derive their force and effect from the common law, and not from the statute. The statute does not give such deeds any power or validity. All it does is to prescribe a mode of enforcing the trust. It found them already established, and simply provided for the better security of the creditor by requiring that the trustees should give bond for the faithful discharge of their trusts, and should file statements showing what had been done, and provided a

simple and speedy means of enforcing and regulating the trust, which, before that act was passed, had to be sought through a court of chancery. *Cook et al v. Rogers*, Am. Law Reg. July, 1875, 453; *In re Hawkins*, 2 Nat. Bank. Reg. 122.

Mr. Adam A. Kramer, contra.

The main question involved in this case is, whether the adjudication in Bankrupt had the effect of suspending the further operation of the State assignment laws. The jurisdiction of the United States courts under the Bankruptcy Act cannot be concurrent with that of the State courts under the assignment laws of the State. It must be exclusive in that court, which only can and should administer the estate and adjust the affairs of a bankrupt. *Sturges v. Crowninshield*, 4 Wheat. 122; *Ogden v. Saunders*, 12 Wheat. 213, 214; *Griswold v. Pratt*, 9 Met.; *Larrabee v. Talbot*, 5 Gill, 426; *Ex parte Lucius Eames*, 2 Story, C. C. 322; *In re Reynolds*, 9 Nat. Bank. Reg. 50; *Allen & Co. v. Montgomery*, 10 Nat. Bank Reg. 503. The Bankrupt Act was intended, and must be presumed, to afford the best mode of administering the estates of insolvents. It will not tolerate an attempt to carry into effect any other plan inconsistent therewith. *Cookingham v. Morgan*, 5 B. R. 16, 7 Blatchf. 480.

It is not claimed, that, although the assignment was a valid, legal, and fair one for the benefit of all the creditors, the subsequent adjudication in bankruptcy rendered it invalid, illegal, and unfair, but that it had the effect of suspending its further operation.

The Bankrupt Act of March 2, 1867, as soon as it went into operation, *ipso facto* suspended all action arising under State laws. *Commonwealth v. O'Hara*, 1 Nat. Bank. Reg. 19; *In re Krogman*, 5 Nat. Bank Reg. 116.

It is immaterial whether the statute of Ohio, under which the assignment was made, is properly an insolvent law. It, however, certainly purports and contemplates the control and disposition of the estate of persons who are unable to pay their debts, and are therefore insolvent. It is an insolvent act, because it presumes the debtor to be unable to pay his debts; but it is not a bankrupt act in the strict sense, for it does not purport to discharge the debtor from paying them.

The most important authority on this question, the one containing the clearest reasoning, is the opinion of the court, per Blodgett, J., *In re Merchants' Insurance Company*, 6 Nat. Bank. Reg. 43:—

"It seems clear to us, that in so far as a State law attempts to administer on the effects of an insolvent debtor, and distribute them among his creditors, it is to all intents and purposes an insolvent law, although it may not authorize a discharge of a debtor from further liability; . . . and, when insolvency exists so as to make the debtor a proper subject for the operation of the Bankrupt Act, the exclusive jurisdiction of the Bankrupt Court attaches, and the State court and those acting under its mandate must surrender the control of its assets."

By insolvency, as used in the provisions of the Bankrupt Act when applied to traders and merchants, is meant their inability to pay their debts as they become due in the ordinary course of their business.

This is the legal definition of the term, and such has been the universal construction of it by the Federal courts. *In re Goldschmidt*, 3 B. R. 165; *In re Freeman*, 4 B. R. 64; *In re Lutgens*, 7 Pac. L. R. 89; *In re Alonzo Pearce*, 21 Vt. 611; *In re Brodhead*, 2 B. R. 278; *Smith v. Ely*, 1 N. Y. Leg. Obs. 343; *Sawyer v. Turpin*, 5 B. R. 339; *In re Walton et al.*, Deady, 442.

MR. JUSTICE FIELD delivered the opinion of the court.

The validity of the claim of the assignee in bankruptcy depends, as a matter of course, upon the legality of the assignment made under the laws of Ohio. Independently of the Bankrupt Act, there could be no serious question raised as to its legality. The power which every one possesses over his own property would justify any such disposition as did not interfere with the existing rights of others; and an equal distribution by a debtor of his property among his creditors, when unable to meet the demands of all in full, would be deemed not only a legal proceeding, but one entitled to commendation. Creditors have a right to call for the application of the property of their debtor to the satisfaction of their just demands; but, unless there are special circumstances giving priority of right to the demands of one creditor over another, the rule of equity would require the equal and ratable distribution of the debtor's property for the benefit of all of them. And so, whenever such a disposition has been voluntarily made by the debtor, the courts in this country have uniformly expressed their approbation of the proceeding. The hinderance and delay to particular creditors, in their efforts to reach before others the property of the debtor, that may follow such a conveyance, are regarded as unavoidable incidents to a just and lawful act, which in no respect impair the validity of the transaction.

The great object of the Bankrupt Act, so far as creditors are concerned, is to secure equality of distribution among them of the property of the bankrupt. For that purpose, it sets aside all transactions had within a prescribed period previous to the petition in bankruptcy, defeating, or tending to defeat, such distribution. It reaches to proceedings of every form and kind undertaken or executed within that period by which a preference can be secured to one creditor over another, or the purposes of the act evaded. That period is four months for some transactions, and six months for others. Those periods constitute the limitation within which the transactions will be examined and annulled, if conflicting with the provisions of the Bankrupt Act.

Transactions anterior to these periods are presumed to have been acquiesced in by the creditors. There is sound policy in prescribing a limitation of this kind. It would be in the highest degree injurious to the community to have the validity of business transactions with debtors, in which it is interested, subject to the contingency of being

assailed by subsequent proceedings in bankruptcy. Unless, therefore, a transaction is void against creditors independently of the provisions of the Bankrupt Act, its validity is not open to contestation by the assignee, where it took place at the period prescribed by the statute anterior to the proceedings in bankruptcy. The assignment in this case was not a proceeding, as already said, in hostility to the creditors, but for their benefit. It was not, therefore, void as against them, or even voidable. Executed six months before the petition in bankruptcy was filed, it is, to the assignee in bankruptcy, a closed proceeding.

The counsel of the plaintiffs in error have filed an elaborate argument to show that assignments for the benefit of creditors generally are not opposed to the Bankrupt Act, though made within six months previous to the filing of the petition. Their argument is, that such an assignment is only a voluntary execution of what the Bankrupt Court would compel; and as it is not a proceeding in itself fraudulent as against creditors, and does not give a preference to one creditor over another, it conflicts with no positive inhibition of the statute. There is much force in the position of counsel, and it has the support of a decision of the late Mr. Justice Nelson, in the Circuit Court of New York, in *Sedgwick v. Place*, First Nat. Bank. Reg. 204, and of Mr. Justice Swayne in the Circuit Court of Ohio, in *Langley v. Perry*, 2 Nat. Bank. Reg. 180. Certain it is that such an assignment is not absolutely void; and, if voidable, it must be because it may be deemed, perhaps, necessary for the efficiency of the Bankrupt Act that the administration of an insolvent's estate shall be intrusted to the direction of the District Court, and not left under the control of the appointee of the insolvent. It is unnecessary, however, to express any decided opinion upon this head; for the decision of the question is not required for the disposition of the case.

In the argument of the counsel of the defendant in error, the position is taken that the Bankrupt Act suspends the operation of the act of Ohio regulating the mode of administering assignments for the benefit of creditors, treating the latter as an insolvent law of the State. The answer is, that that statute of Ohio is not an insolvent law in any proper sense of the term. It does not compel, or in terms even authorize, assignments: it assumes that such instruments were conveyances previously known, and only prescribes a mode by which the trust created shall be enforced. It provides for the security of the creditors by exacting a bond from the trustees for the discharge of their duties; it requires them to file statements showing what they have done with the property; and affords in various ways the means of compelling them to carry out the purposes of the conveyance. There is nothing in the act resembling an insolvent law. It does not discharge the insolvent from arrest or imprisonment: it leaves his after-acquired property liable to his creditors precisely as though no assignment had been made. The provisions for enforcing the trust are substantially such as a court of chancery would apply in the absence of any statutory

provision. The assignment in this case must, therefore, be regarded as though the statute of Ohio, to which reference is made, had no existence. There is an insolvent law in that State; but the assignment in question was not made in pursuance of any of its provisions. The position, therefore, of counsel, that the Bankrupt Law of Congress suspends all proceedings under the Insolvent Law of the State, has no application.

The assignment in this case being in our judgment valid and binding, there was no property in the hands of the plaintiffs in error which the assignee in bankruptcy could claim. The assignment to them divested the insolvents of all proprietary rights they held in the property described in the conveyance. They could not have maintained any action either for the personalty or realty. There did, indeed, remain to them an equitable right to have paid over to them any remainder after the claims of all the creditors were satisfied. If a contingency should ever arise for the assertion of this right, the assignee in bankruptcy may perhaps have a claim for such remainder, to be applied to the payment of creditors not protected by the assignment, and whose demands have been created subsequent to that instrument. Of this possibility we have no occasion to speak now.

Our conclusion is, that the court below erred in sustaining the demurrer to the defendant's answer; and the judgment of the court must, therefore, be reversed, and the cause remanded for further proceedings.

BOESE v. KING.

SUPREME COURT OF THE UNITED STATES, APRIL 30, 1883.

[Reported in 108 United States, 379.]

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SUIT by a receiver appointed by a State court in New York on return of execution unsatisfied; brought in New York against assignees of the property of the judgment debtor under an assignment for the benefit of creditors, made in accordance with the laws of New Jersey (of which State the assignees and the debtor are citizens), and to recover proceeds of the debtor's property voluntarily brought within the State of New York by the assignees for distribution under the assignment.

By deed of assignment executed and delivered September 25, 1873, Wm. H. Locke, a citizen of New Jersey, transferred and conveyed to Wm. King, John M. Goetchius, and Edward E. Poor, and the survivor of them, and their and his heirs and assigns, all his property of every kind and description — except such as was exempt by law from execution — “in trust to take possession of and collect and to sell and dispose of the same at public or private sale in their discre-

tion, and to distribute the proceeds to and among the creditors of the said Wm. H. Locke, in proportion to their several just demands, pursuant to the statutes in such case made and provided, and on the further trust to pay the surplus, if any there be, after fully satisfying and paying the said creditors and all proper costs and charges, to the said Wm. H. Locke."

The intention of Locke and the assignors was to have a distribution made among the creditors of the former in conformity with the requirements of an act of the legislature of New Jersey, passed April 16, 1846, entitled "An Act to secure to creditors an equal and just division of the estates of debtors who convey to assignees for the benefit of creditors."

That act provided, among other things, that every conveyance or assignment by a debtor of his estate, real or personal or both, in trust, to an assignee for the benefit of creditors, shall be made for their equal benefit in proportion to their several demands to the net amount that shall come to the hands of the assignee for distribution; and all preferences of one creditor over another, or whereby one shall be first paid or have a greater proportion in respect to his claim than another, shall be deemed fraudulent and void, excepting mortgage and judgment creditors, when the judgment has not been by confession for the purpose of preferring creditors (§ 1); further, that the debtor shall annex to his assignment an inventory, under oath or affirmation, of all of his property, together with a list of his creditors, and the amount of their respective claims, such inventory not, however, to be conclusive as to the quantity of the debtor's estate, and the assignee to be entitled to any other property belonging to the debtor at the time of the assignment, and comprehended within its general terms (§ 2). Other sections provided for public notice by the assignee of the assignment; for the presentation of claims of creditors; for filing by the assignee under oath of a true inventory and valuation of the estate; for the execution by him of a bond in double the amount of such inventory or valuation; for the recording of such bond; for the filing with the clerk of the court of common pleas of the county of the debtor's residence, within three months after the date of the assignment, of a list of all such creditors as claim to be such, and the amount of their demands, first making it known by advertisement that all claims against the estate must be made as prescribed in the statute, or be forever barred from coming in for a dividend of said estate, otherwise than as provided; for the right of the assignee or any creditor or person interested to except to the allowance of any claim presented; for the adjudication of such exceptions; for fair and equal dividends from time to time among the creditors of the assets in proportion to their respective claims; and for a final accounting by the assignee in the orphans' court of the county — such settlement and adjudication to be conclusive on all parties, except for assets which may afterward come to hand, or for frauds or apparent error (§§ 3, 4, 5, 6, and 7).

The act further provided —

"§ 11. If any creditor shall not exhibit his, her, or their claims within the term of three months as aforesaid, such claim shall be barred of a dividend unless the estate shall prove sufficient after the debts exhibited and allowed are fully satisfied, or such creditor shall find some other estate not accounted for by the assignee or assignees before distribution, in which case such barred creditor shall be entitled to a ratable proportion therefrom.

"§ 12. Whenever any assignee or assignees, as aforesaid, shall sell any real estate of such debtor or debtors as is conveyed in trust as aforesaid, he or they shall proceed to advertise and sell the same in manner as is now or may hereafter be prescribed in the case of an executor or administrator directed to sell lands by an order of the orphans' court for the payment of the debts of the testator or intestate.

"§ 13. Every assignee, as aforesaid, shall have as full power and authority to dispose of all estate, real and personal, assigned, as the said debtor or debtors had at the time of the assignment, and to sue for and recover in the proper name of such assignee or assignees, everything belonging or appertaining to said estate, real or personal, of said debtor or debtors, and shall have full power and authority to refer to arbitration, settle and compound, and to agree with any person concerning the same, and to redeem all mortgages and conditional contracts, and generally to act and do whatever the said debtor or debtors might have lawfully done in the premises.

"§ 14. Nothing in this act shall be taken or understood as discharging said debtor or debtors from liabilities to their creditors who may not choose to exhibit their claims either in regard to the persons of such debtors or to any estate, real or personal, not assigned as aforesaid, but with respect to the creditors who shall come in under said assignment and exhibit their demands as aforesaid for a dividend, they shall be wholly barred from having afterward any action or suit at law or equity against such debtors or their representatives, unless on the trial of such action or hearing in equity the said creditor shall prove fraud in the said debtor or debtors with respect to the said assignment, or concealing his estate, real or personal, whether in possession, held in trust, or otherwise."

The estate which came into the hands of the assignees was converted into money in New Jersey, — the amount being nearly \$200,000, — and the proceeds, for the convenience of the assignees, were deposited in a bank in the city of New York. No proceedings in bankruptcy were ever taken against Locke.

On the 3d day of February, 1876, William Pickhardt and Adolph Kutroff recovered a judgment against Locke in the Supreme Court of the city and county of New York for \$3,086.85. Upon that judgment execution was issued and returned unsatisfied. Subsequently, May 27, 1876, in certain proceedings, before one of the judges of that court,

supplementary to the return of execution, Thomas Boese, plaintiff in error, was appointed receiver of the property of Locke, and having executed a bond for the faithful discharge of the duties of his trust, he obtained an order from the same court giving him authority, as receiver, to bring an action against the assignees of Locke. Thereupon, June 9, 1876, he commenced this action. It proceeds upon these grounds: 1. That the indebtedness from Locke to Pickhardt and Kutroff arose in New York, where they reside, before the making of said assignment; 2. That the statute of New Jersey with reference to or under which said assignment was made was, by force of the Bankruptcy Act of 1867, suspended and of no effect; 3. That the assignment was fraudulent and void by the laws of New Jersey, in that it was made with the intent upon the part of Locke to hinder, delay, and defraud his creditors, and in that he had a large amount of money and other property which he fraudulently retained to his own use and did not surrender to the assignees.

The prayer of the complaint — the allegations of which were fully met by answer — was for judgment against the defendants; that the assignments be adjudged fraudulent and void; and that the defendants be required to account to plaintiff for all the property and money received or to which they are entitled under and by virtue of the assignment. It was conceded at the hearing that defendants had in their hands, of the proceeds of the sale of the assigned property, an amount sufficient to pay the judgment of Pickhardt and Kutroff.

The Supreme Court of New York, both in general and special terms, sustained the action and gave judgment against the assignees in favor of Boese, as receiver, for the amount of the demand of Pickhardt and Kutroff.¹ But in the Court of Appeals that judgment was reversed, with directions to enter judgment for the defendants.²

The receiver brought the suit here in error asking to have this decision reversed.

Mr. C. Bainbridge Smith, for plaintiff in error.

Mr. A. P. Whitehead, for defendant in error.

MR. JUSTICE HARLAN delivered the opinion of the court. After reciting the facts in the foregoing language he continued:—

We are to consider in this case whether the final judgment of the Court of Appeals of New York has deprived the plaintiff in error of any right, title, or privilege under the Constitution or laws of the United States.

We dismiss from consideration all suggestions in the pleadings of actual fraud upon the part either of Locke or of his assignees. The court of original jurisdiction found as a fact — and upon that basis the case was considered by the Court of Appeals — that the assignment was executed and delivered by the former and accepted by the latter in good faith and without any purpose to hinder, delay, or defraud any creditor of Locke. It is further found as a fact that the assignment

¹ Boese v. Locke, 17 Hun, 270.

² Boese v. King, 78 N. Y. 471.

was made with the intent, *bona fide*, to make an equal distribution of the proceeds of the trust estate among creditors, in conformity with the local statute. The Supreme Court of New York ruled that the statute of New Jersey was, in its nature and effect, a bankrupt law, and the power conferred upon Congress to establish a uniform system of bankruptcy, having been exercised by the passage of the act of 1867, the latter act wholly suspended the operation of the local statute as to all cases within its purview; consequently, it was held, the assignment was not valid for any purpose. The Court of Appeals, recognizing the paramount nature of the Bankrupt Act of Congress, and assuming that the 14th section of the New Jersey statute, relating to the effect upon the claims of creditors who exhibit their demands for a dividend, was inconsistent with that act, and therefore inoperative, adjudged that other portions of the local statute providing for the equal distribution of the debtor's property among his creditors, and regulating the general conduct of the assignee, were not inconsistent with nor were they necessarily suspended by the act of 1867; further, that the New Jersey statute did not create the right to make voluntary assignments for the equal benefit of creditors, but was only restrictive of a previously existing right, and imposed, for the benefit of creditors, salutary safeguards around its exercise; consequently, had the whole of the New Jersey statute been superseded, the right of a debtor to make a voluntary assignment would still have existed. The assignment, as a transfer of the debtor's property, was, therefore, upheld as in harmony with the general object and purposes of the Bankrupt Act, unassailable by reason merely of the fact that some of the provisions of the local statute may have been suspended by the act of 1867.

In the view which we take of the case it is unnecessary to consider all of the questions covered by the opinion of the State court and discussed here by counsel. Especially it is not necessary to determine whether the Bankrupt Act of 1867 suspended or superseded all of the provisions of the New Jersey statute. Undoubtedly the local statute was, from the date of the passage of the Bankrupt Act, inoperative in so far as it provided for the discharge of the debtor from future liability to creditors who came in under the assignment and claimed to participate in the distribution of the proceeds of the assigned property. It is equally clear, we think, that the assignment by Locke of his entire property to be disposed of as prescribed by the statute of New Jersey, and therefore independently of the bankruptcy court, constituted, itself, an act of bankruptcy, for which, upon the petition of a creditor filed in proper time, Locke could have been adjudged a bankrupt, and the property wrested from his assignees for administration in the bankruptcy court. In re Burt, 1 Dillon, 439, 440; In re Goldschmidt, 3 Bank. Reg. 164; In matter of Seymour T. Smith, 4 Bank. Reg. 377. The claim of Pickhardt and Kutroff existed at the time of the assignment. The way was, therefore, open for them, by timely action, to secure the control and management of the assigned property by that

court for the equal benefit of all the creditors of Locke. But they elected to lie by until after the expiration of the time within which the assignment could be attacked under the provisions of the Bankrupt Act; and now seek, by this suit in the name of the plaintiff in error, to secure an advantage or preference over all others; this, notwithstanding the assignment was made without any intent to hinder, delay, or defraud creditors. In order to obtain that advantage or preference, the plaintiff in error relies on the paramount force of the Bankrupt Act, the primary object of which, as this court has frequently announced, was to secure equality among the creditors of a bankrupt. Mayer v. Hellman, 91 U. S. 496-501; Reed v. McIntyre, 98 U. S. 507-509; Buchanan v. Smith, 16 Wall. 277. It can hardly be that the court is obliged to lend its aid to those who, neglecting or refusing to avail themselves of the provisions of the act of Congress, seek to accomplish ends inconsistent with that equality among creditors which those provisions were designed to secure. If it be assumed, for the purposes of this case, that the statute of New Jersey was, as to each and all of its provisions, suspended when the Bankrupt Act of 1867 was passed, it does not follow that the assignment by Locke was ineffectual for every purpose. Certainly, that instrument was sufficient to pass the title from Locke to his assignees. It was good as between them, at least until Locke, in some appropriate mode, or by some proper proceedings, manifested a right to have it set aside or cancelled upon the ground of a mutual mistake in supposing that the local statute of 1846 was operative. And in the absence of proceedings in the bankruptcy court impeaching the assignment, and so long as Locke did not object, the assignees had authority to sell the property and distribute the proceeds among all the creditors, disregarding so much of the deed of assignment as required the assignees, in the distribution of the proceeds, to conform to the local statute. The assignment was not void as between the debtor and the assignees simply because it provided for the distribution of the proceeds of the property in pursuance of a statute, none of the provisions of which, it is claimed, were then in force. Had this suit been framed for the purpose of compelling the assignees to account to all the creditors for the proceeds of the sale of the property committed to their hands, without discrimination against those who did not recognize the assignment and exhibit their demands within the time and mode prescribed by the New Jersey statute, a wholly different question would have been presented for determination. It has been framed mainly upon the idea that by reason of the mistake of Locke and his assignees in supposing that the property could be administered under the provisions of the local statute of 1846, even while the Bankrupt Act was in force, the title did not pass for the benefit of creditors according to their respective legal rights. In this view, as has been indicated, we do not concur.

We are of opinion that, except as against proceedings instituted under the Bankrupt Act for the purpose of securing the administration

of the property in the bankruptcy court, the assignment, having been made without intent to hinder, delay, or defraud creditors, was valid, for at least the purpose of securing an equal distribution of the estate among all the creditors of Locke, in proportion to their several demands, Reed v. McIntire, 98 U. S. 507-509; and, consequently, we adjudge only that the plaintiff in error is not entitled, by reason of any conflict between the local statute and the Bankrupt Act of 1877, or by force of the before-mentioned judgment and the proceedings thereunder, to the possession of the assigned property or of its proceeds, as against the assignees, or to a priority of claim for the benefit of Pickhardt and Kutroff upon such proceeds.

The judgment is affirmed.

MR. JUSTICE MATTHEWS (with whom concurred MILLER, GRAY, and BLATCHFORD, JJ.), dissenting.

MR. JUSTICE MILLER, MR. JUSTICE GRAY, MR. JUSTICE BLATCHFORD, and myself, are unable to agree with the opinion and judgment of the court in this case. The grounds of our dissent may be very generally and concisely stated as follows:—

The New Jersey statute of April 16, 1846, the validity and effect of which are in question, is an insolvent or bankrupt law, which provides for the administration of the assets of debtors who make assignments of all their assets to trustees for creditors, and for their discharge from liabilities to creditors sharing in the distribution. It was accordingly in conflict with the National Bankrupt Act of 1867 when the latter took effect, and from that time became suspended and without force until the repeal of the act of Congress. It is conceded that the 14th section, which provides for the discharge of the debtor, is void by reason of this conflict, and, in our opinion, this carries with it the entire statute. For the statute is an entirety, and, to take away the distinctive feature contained in the 14th section, destroys the system. It is not an independent provision, but an inseparable part of the scheme contained in the law.

This being so, the assignment in the present case must be regarded as unlawful and void as to creditors. For it was made in view of this statute and to be administered under it. Such is the express recital of the instrument and the finding of the fact by the court. It is as if the provisions of the act had been embodied in it and it had declared expressly that it was executed with the proviso that no distribution should be made of any part of the debtor's estate to any creditor except upon condition of the release of the unpaid portion of his claim.

It is not possible, we think, to treat the assignment as though the law of the State in view of which it was made, and subject to the provisions of which it was intended to operate, had never existed, or had been repealed before its execution. Because there is no reason to believe that, in that state of the case, the debtor would have made an assignment on such terms. To do so is to construct for him a contract which he did not make and which there is no evidence that he intended

to make. It must be regarded, then, as a proceeding under the statute of New Jersey, and as such, with that statute, made void, as to creditors, by the National Bankrupt Act of 1867. Otherwise that uniform rule as to bankruptcies, which it was the policy of the Constitution and of the act of Congress pursuant to it, to provide, would be defeated. No title under it, therefore, could pass to the defendants in error, and the judgment creditors who acquired a lien upon the fund in their hands were by law entitled to appropriate it, as the property of their debtor, to the payment of their claims.

For these reasons we are of opinion that the judgment of the Court of Appeals of New York should be reversed.¹

¹ Assignments made in accordance both with State laws and the principles of common law were upheld in *Hawkins's Appeal*, 34 Conn. 548; *Maltbie v. Hotchkiss*, 38 Conn. 80; *Geery's Appeal*, 43 Conn. 289, 298; *Cook v. Rogers*, 31 Mich. 391; *Thrasher v. Bentley*, 59 N. Y. 649; *Beck v. Parker*, 65 Pa. 262; *Patty-Joiner Co. v. Cummins*, 93 Tex. 598; *Binder v. McDonald*, 106 Wis. 332. In the case last cited a provision of the State law dissolving attachments prior to an assignment was held to be still in force.

Assignments which derived their validity and efficacy from a State insolvent law were held void in *Shryock v. Bashore*, 13 B. R. 481; *Ketcham v. McNamara*, 72 Conn. 709; *Rowe v. Page*, 51 N. H. 190.

Before the decision in *Boese v. King* it was held by some courts that a general assignment for the benefit of creditors was not an act of bankruptcy or opposed to the policy of the National Act. Such courts, therefore, held such an assignment effectual even though a petition in bankruptcy was filed within six months. *Sedgwick v. Place*, 1 B. R. 204; *Haas v. O'Brien*, 66 N. Y. 597; *Von Hein v. Elkus*, 8 Hun, 516. But the great weight of authority was otherwise. Under the present act a general assignment is uniformly held to be made voidable if not void by a seasonable petition. See post, ch. iv, sec. iii.

CHAPTER II.

WHO MAY BE A BANKRUPT.

SECTION I.

ALIENS AND NON-RESIDENTS.

IN RE PLOTKE.

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CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT, NOVEMBER 22, 1900.

[Reported in 104 Federal Reporter, 964.]

BEFORE WOODS and GROSSCUP, Circuit Judges, and SEAMAN, District Judge.

SEAMAN, District Judge. The alleged bankrupt, Emily Plotke, appeals from an order of the District Court whereby she is adjudicated a bankrupt upon a creditors' petition filed May 3, 1899. The petition states that "Emily Plotke has for the greater portion of six months next preceding the date of filing this petition had her principal place of business and her domicile at Chicago," in said district, and "owes debts to the amount of \$1,000 and over"; that she is insolvent, and within four months next preceding "committed an act of bankruptcy," and on January 3, 1899, made "a general assignment for the benefit of her creditors to one John Poppowitz," which was duly filed and recorded. The subpoena issued thereupon was returned by the marshal as served within the district on Emily Plotke, "by leaving a true copy thereof at her usual place of abode, with Charles Plotke, an adult person, who is a member of the family." On May 29, 1899, the appellant filed a verified plea, which reads as follows:

"And the said Emily Plotke, especially limiting her appearance for the purposes of this plea, in her own proper person comes and defends against the foregoing proceeding, and says that she has not had her domicile within the territorial limits and jurisdiction of this court for the six months next preceding the filing of the petition herein, to wit, six months next preceding May 3, A. D. 1899, nor has she had her domicile within the territorial limits of the jurisdiction of this court as aforesaid during any part of said period of six months, nor has she now her domicile therein, nor has she had her principal place of business within the territorial limits and jurisdiction of this court for the greater part of the six months next preceding the filing of the

petition herein, to wit, six months next preceding May 3, A. D. 1899, but that before and at the time of the filing of the petition herein as aforesaid, on, to wit, May 3, A. D. 1899, and for more than five years prior thereto, she, the said Emily Plotke, was, and from thence hitherto has been, and still is, residing in the city of St. Louis, and the State of Missouri, and not in the said Northern District of Illinois, and State of Illinois, and that she, the said Emily Plotke, was not found or served with process in this said proceeding in said Northern District of Illinois, or in said State of Illinois. Wherefore she says this court is wholly without jurisdiction in the premises, and this she is ready to verify. Wherefore she prays judgment, if this court here shall take jurisdiction and cognizance of the proceedings aforesaid."

The petitioning creditors filed a replication, and the issues thereupon were referred for hearing to a referee, who reported the testimony taken, with findings sustaining the plea and recommending that the petition be dismissed for want of jurisdiction. The finding was overruled by the District Court, and an adjudication of bankruptcy entered, from which this appeal is brought.

The record presents two questions, only, under the several assignment of error: (1) Whether, upon the undisputed facts shown, the case is within the bankruptcy jurisdiction of the District Court; and (2) whether jurisdiction appears over the person of the alleged bankrupt.

The first issue challenges the jurisdiction of the District Court over the estate of the bankrupt, the subject-matter of the proceeding, irrespective of the question of jurisdiction *in personam*. The facts are undisputed that the bankrupt has neither resided nor had her domicile within the district for any period during the six months preceding the filing of the petition, and has resided continuously in the State of Missouri for the past twelve years; that she carried on business in Chicago, within the district (conducted by one Charles Plotke), from April 30, 1897, up to January 3, 1899 (the petition being filed May 3, 1899); and that she executed a voluntary assignment for the benefit of creditors, under the statute of Illinois, on January 3, 1899 (the assignee taking possession forthwith, and subsequently disposing of the assets and closing out the business under orders of the county court). The question is thus narrowed to an interpretation of the provisions of the statute. Section 2, subd. 1, of the Bankruptcy Act (30 Stat. 545) invests district courts with jurisdiction to "adjudge persons bankrupt who have had their principal place of business, resided or had their domicile within their respective territorial jurisdictions for the preceding sixth months, or the greater portion thereof, or who do not have their principal place of business, reside or have their domicile within the United States, but have property within their jurisdiction, or who have been adjudged bankrupts by courts of competent jurisdiction without the United States and have property within their jurisdiction." As both residence and domicile of the bankrupt were beyond the territorial

jurisdiction, the adjudication of bankruptcy rests alone upon the provision respecting the "principal place of business." The appellees contend, in effect, (1) that the proof of a principal place of business in the district for two months, and of no place of business for the remaining period of limitation, establishes a case within the meaning of the words "greater portion thereof," in the section above quoted; and, if not so construed, (2) that the voluntary assignment was void under the law of the forum, and business was carried on thereunder for the requisite period, and was constructively the business of the bankrupt. We are of opinion that neither of these contentions is tenable. The first calls for a departure from the plain meaning of the language used in the statute to make it applicable to conditions which may have been overlooked in framing the provision, but are not within the terms which were adopted; and however desirable it may seem to have such conditions brought within its scope, to carry out the general intent of the act, the correction can be made by legislative amendment only, and not by way of judicial construction. So far as applicable here, the provision confers jurisdiction over bankrupts "who have had their principal place of business" within the territorial jurisdiction "for the preceding six months, or the greater portion thereof." Whether thus considered apart from the provision as to residence and domicile, or as an entirety, the language is unambiguous, if not aptly chosen. The expression "greater portion" of a month or other stated period is frequently used as an approximate measure of time, and its meaning is well understood as the major part or more than half of the period named. No justification appears for construing like terms in this provision otherwise than in the ordinary sense. With jurisdiction dependent upon the single fact of having the principal place of business within the district, the statute then imposes the further prerequisite that such business shall have been there carried on for more than half of the preceding six months. In other words, the limitation is made with reference alone to the duration of the business in the district, and regardless of the fact that its location may be changed short of that period, and thus be carried on in different districts without exceeding the three months in either, or that it may be discontinued entirely without reaching the time limited in any one; and the provisions in reference to domicile and residence are equally restricted, except for the distinction as to residence, that it may be retained in one district after domicile is changed to another. With this meaning clearly conveyed by the language of the statute, the policy of so restricting jurisdiction is not open to judicial inquiry. In support of the construction for which the appellees contend, two decisions are cited whereby section 11 of the Bankrupt Act of 1867 (section 5014, Rev. St.) is so construed, — one by Judge Blatchford (*In re Foster*, 3 Ben. 386, Fed. Cas. No. 4,962), and the other by Judge Lowell (*In re Goodfellow*, 1 Low. 510, Fed. Cas. No. 5,536). However instructive these cases may be in interpret-

ing the present statute, they are not applicable by way of precedent, because of the clear diversity in the respective provisions. Section 11 of the former act gave jurisdiction over petitions filed by voluntary bankrupts to "the judge of the judicial district in which such debtor has resided or carried on business for the six months preceding the time of filing such petition, or for the longest period during such six months"; and the limitation thus stated was held to mean "the longest space of time that the bankrupt has resided or carried on business in any district during the six months." *In re Foster*, supra. It may well be conceded that the language of that provision was susceptible of no other fair interpretation; that "the longest period" of business "during such six months" was clearly implied, and, as remarked by Judge Blatchford, "not the period which, mathematically considered, is the greatest part of the six months." But section 2, subd. 1, of the act of 1898 states the jurisdictional requirements in terms clearly distinguishable from those which were thus construed, namely, that a principal place of business shall have existed within the district "for the preceding six months or the greater portion thereof," thereby establishing as the test continuance of the business in the district for the "greater portion" of the six months, and not "the longest period" of business "in any district during the six months." This departure from the provisions of the prior act is marked both in the change of words and in their collocation, and is not a mere substitution of synonymous words, as argued by counsel.¹

The further contention that the requisite period of carrying on business appears in the conceded facts of the voluntary assignment made January 3, 1899, and the transactions thereunder, is not well founded. The question discussed on the argument, whether the bankrupt act made the assignment void *ab initio*, or voidable only in the event of an adjudication of bankruptcy, as affecting the subsequent possession, however important in one phase, is not material in the absence of a distinct showing that the business was continued under the assignment for more than one month. Where jurisdiction of the federal courts is made dependent upon citizenship or other specific fact, "the presumption in every stage of the cause is that it is without their jurisdiction, unless the contrary appears from the record." *Bors v. Preston*, 111 U. S. 252, 255, 4 Sup. Ct. 407, 28 L. Ed. 419; *Railway Co. v. Swan*, 111 U. S. 379, 383, 4 Supt. Ct. 510, 28 L. Ed. 462. The essential fact must appear affirmatively and distinctly, and "it is not sufficient that jurisdiction may be inferred argumentatively." *Wolfe v. Insurance Co.*, 148 U. S. 389, 13 Sup. Ct. 602, 37 L. Ed. 493; *Parker v. Ormsby*, 141 U. S. 81, 83, 11 Sup. Ct. 912, 35 L. Ed. 654. In the case at bar the record fails to show that the business was carried on by the assignee for any definite period, and the proof is insufficient to confer

¹ *Re Ray*, 2 Am. B. R. 158 (Referee), *contra*.

A member of the Chickasaw tribe of Indians in the Indian Territory was held properly adjudicated a bankrupt in *Re Rennie*, 2 Am. B. R. 182 (Referee).

jurisdiction, within the rule stated, even on the assumption that the transactions of the assignee were, in legal effect, the carrying on of business by the assignor. It is true that a sale of the assigned property (a stock of goods) appears to have been made by the assignee as an entirety, thus closing out the business; but the time is not stated, and it may well be inferred from the testimony that such sale occurred soon after the assignment was made. The mere fact that proceeds of such sale are retained in the hands of the assignee for distribution is not carrying on business, in the sense of the statute. The active business then ceased, and the liability to account for the proceeds is no more operative to save the limitation than would be the case if the business were closed out directly by the bankrupt, either with or without subsequent payment of debts out of the proceeds. No evidence being produced to overcome the presumption of fact against jurisdiction, the question of the legal status of the assignment does not require consideration. It may be remarked, however, that the validity of the assignment is not questioned under the State statute, and its status depends upon a construction of the provisions of the national Bankruptcy Act in that regard, and the inquiry is not one which is governed by any rule of decision in the State. In so far, therefore, as *Harbaugh v. Costello*, 184 Ill. 110, 56 N. E. 363, passes upon the effect of such action on voluntary assignments made after its passage, the decision is not necessarily controlling, as contended by counsel; but that question, when presented, will call for independent judgment, in the light of all the authorities. In *Mayer v. Hellman*, 91 U. S. 496, 500, 23 L. Ed. 377, a different construction appears to have been placed upon the bankrupt act of 1867; and in *Simonson v. Sinsheimer*, 95 Fed. 948, 952, 37 C. C. A. 337, 342, that ruling is cited as equally applicable under the present act. See also, *Davis v. Bohle*, 92 Fed. 325, 34 C. C. A. 372; *In re Gutwillig*, 92 Fed. 337, 34 C. C. A. 377; *In re Gutwillig* (D. C.) 90 Fed. 475, 478, cited with approval in *West Co. v. Lea*, 174 U. S. 590, 596, 19 Sup. Ct. 836, 43 L. Ed. 1098.

We are of opinion, therefore, that the District Court was without jurisdiction of the cause alleged in the petition, and the question whether the want of personal service was waived by appearance does not call for solution. The order of the District Court is reversed, accordingly, with direction to dismiss the petition for want of jurisdiction.

McCONNELL v. KELLEY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER 6, 7,
1884—JANUARY 13, 1885.

[Reported in 138 *Massachusetts*, 372.]

BILL in equity to vacate and set aside a warrant issued by the judge of insolvency for Essex County, upon the petition of the defendant Kelley. Hearing before DEVENS, J., who reserved the case for the consideration of the full court. The facts appear in the opinion.

B. N. Johnson (*G. B. Ives* with him), for the plaintiffs.

W. Gaston & W. A. Knowlton, for the defendants.

MORTON, C. J. Our insolvent law provides that "an inhabitant of this State owing debts contracted while such inhabitant" may apply to the judge of the court of insolvency of the county within which he resides for the benefit of the insolvent law, and, if it appears that he owes debts to the amount of not less than \$200, the said judge is forthwith to issue a warrant: it also provides that, for certain causes assigned, creditors may commence involuntary proceedings against a debtor, if he "has resided in the State within one year." Pub. Sts. c. 157. In the case before us, the defendant Kelley duly filed his petition to the judge of insolvency for Essex County, who thereupon issued a warrant to take possession of his property; and the plaintiffs, who are creditors having attachments of said Kelley's property, thereupon brought this bill to vacate and set aside the warrant.

The justice of this court who heard the case found, as a fact, that, before filing his petition, Kelley moved from the State of New Hampshire into Methuen in the county of Essex, and "became a resident of this State."

The plaintiffs have argued that there is not sufficient evidence to show that Kelley had become an inhabitant of this State; but this is not open to them upon this report. The evidence is not reported in full, and we therefore cannot revise the finding of the justice who heard the case. Throughout the statute the words "resides" and "resided" are constantly used as describing inhabitancy, and generally the word "resident" in a legal sense is synonymous with inhabitant. We cannot doubt that the presiding justice used it in this sense; and that the questions intended to be presented by the report were whether Kelley, although he removed to and became an inhabitant of this State, is deprived of the benefit of the insolvent law, because the sole purpose of his change of domicile or inhabitancy, and of contracting debts in this State, was that he might have the benefit of such law.

A man has a right to change his domicile for any reasons satisfactory to himself. In determining whether there has been such a change from one place to another, the test is to inquire whether he has in fact removed his home to the latter place with the intention of making it his

residence permanently, or for an indefinite time. If he has, he loses his old domicile, and acquires a new one with all its rights and incidents; and the law does not inquire into the purposes or motives which induced him to make such change. It may be because he prefers the laws of the new place of domicile, or because he can diminish his taxes and other burdens, or because he desires to bring a suit in a court which would not otherwise have jurisdiction. *Thayer v. Boston*, 124 Mass. 132; *Case v. Clark*, 5 Mason, 70. His status as an inhabitant depends upon the fact that he has made a change of his home, and not upon the motives or reasons which influenced him to do so.

In the case at bar, therefore, it being found as a fact that the respondent Kelley had become a resident of this State, he had the right to apply for the benefit of the insolvent laws, although his sole purpose in making the change of his domicile was to enable himself to do so.

It also appeared at the hearing, that most of the debts due by Kelley, though due largely to residents of Massachusetts, were contracted while he was an inhabitant of New Hampshire; and that after he removed to Massachusetts, and before he filed his petition in insolvency, he contracted debts in this State of between \$200 and \$300, "for the purpose of owing debts contracted in Massachusetts, and thus enabling himself to commence proceedings in Massachusetts;" and the plaintiffs contend that this ousts the jurisdiction of the court of insolvency.

The jurisdiction of the court depends upon the facts, that the applicant is an inhabitant of the State, and owes some debts contracted while such inhabitant. Pub. Sts. c. 157, § 16; *Breed v. Lyman*, 4 Allen, 170. These facts being proved, the jurisdiction attaches, and we do not think the judge of insolvency can inquire into the circumstances under which the debts were contracted, or the motives and purposes of the applicant in contracting them. Nor can he inquire whether the debts which are the basis of his jurisdiction are debts which will be barred by the discharge. He has no jurisdiction to make such inquiry. He can only inquire whether there are *bona fide* debts contracted while the applicant was an inhabitant of the State.

The facts in this case show that there were such debts. If the applicant had any improper purpose in contracting them, the creditors were not participants in it. Their debts are just and *bona fide* debts, which are provable under the insolvency proceedings; and we are of opinion that the court of insolvency had jurisdiction to issue the warrant, although the insolvent debtor contracted them for the purpose of putting himself in a position which enabled him to take the benefit of the insolvent law.

*Bill dismissed.*¹

¹ The rule in regard to giving a federal court jurisdiction of a cause by change of citizenship is the same. In *Morris v. Gilmer*, 129 U. S. 315, 328, Harlan, J., delivering the opinion of the court, said: "It is true, as contended by the defendant, that a citizen of the United States can instantly transfer his citizenship from one State to another, *Cooper v. Galbraith*, 3 Wash. C. C. 546, 554, and that his right to sue in the courts of the United States is none the less because his change of domicile was induced by the purpose, whether avowed or not, of invoking, for the protection of his

SECTION II.

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INFANTS AND MARRIED WOMEN.

IN RE BRICE.

DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT
OF IOWA, MAY 4, 1899.

[Reported in 93 Federal Reporter, 942.]

WOOLSON, District Judge. Carl S. Brice having filed his petition in voluntary bankruptcy, the petition was regularly referred to George W. Seevers, Esq., as referee in bankruptcy. Upon April 3, 1899, said referee formally adjudicated said Brice to be a bankrupt, and duly gave notice for first meeting of creditors. Shortly prior to the day fixed for said first meeting, Wyman, Partridge & Co., claiming to be creditors of said Brice, presented to the judge of this court their petition, wherein they sought vacation of said adjudication. The grounds on which such vacation was sought were, in substance, that at date of such adjudication said Brice was "a minor, and under the age of twenty-one years, and not 'a person' within the intent of the bankruptcy statute," and therefore not entitled to the benefits of said statute; that such fact was not disclosed by the petition filed by him, nor upon said adjudication. An amendment to such petition for vacation alleges as further ground that this court has not jurisdiction to entertain said Brice's petition, because said Brice, up to the filing of his petition, continuously had his domicile and residence and principal place of business within the Northern District of this State. To this petition for vacation of order of adjudication Brice files his answer, admitting that he is under twenty-one years of age, but averring that when he was nineteen years old he was manumitted by his father, and that for more than six months before the filing of his said petition in bankruptcy, and at the date of such filing, he was openly engaged in business as a merchant in Mahaska County, in this district.

Counsel for said Brice, for said petitioning creditors, as well as for other creditors, have been heard orally and by briefs. Upon the hear-

rights, the jurisdiction of a federal court. As said by Mr. Justice Story, in *Briggs v. French*, 2 Sumner, 251, 256, 'if the new citizenship is really and truly acquired, his right to sue is a legitimate, constitutional, and legal consequence, not to be impeached by the motive of his removal.' *Manhattan Ins. Co. v. Broughton*, 109 U. S. 121, 125; *Jones v. League*, 18 How. 76, 81. There must be an actual, not pretended, change of domicile; in other words, the removal must be 'a real one, *animo manendi*, and not merely ostensible.' *Case v. Clark*, 5 Mason, 70. The intention and the act must concur in order to effect such a change of domicile as constitutes a change of citizenship."

ing said Brice was examined under oath. The following facts appear: In January, 1898, the father of said Brice executed an instrument, which follows the general form and contains the substance of what is generally accepted as a manumission paper. It was conceded on the hearing that such paper is amply sufficient, as between father and son, to accomplish the purpose for which it was intended. This paper was published in one of the principal newspapers where the father and son resided. Since said date of manumission, and up to the filing of his petition herein, said C. S. Brice was employed in his father's store in Tama County, Iowa, as a clerk, upon a monthly salary. Said Brice also opened up, in Oskaloosa, Mahaska County, Iowa, a store, for general merchandise purposes, and had maintained the same for over six months prior to filing of his said bankruptcy petition. He was very seldom at his Oskaloosa store, and in fact took no leading part in the management or details of business therein. His brother-in-law, one Barber, was in charge as manager, made the purchases of goods, made whatever payments thereon were made, engaged those employed in said store, and attended to obtaining the lease of the store premises; but the lease was taken in the name of said Brice, and all purchases were also made in said Brice's name. There is presented herein no claim that any fraud was perpetrated or attempted in the matters named. All the creditors dealt with said store as being the property of said Brice. The debts scheduled in the petition for bankruptcy aggregate \$24,608.10. The stock of goods are scheduled at an aggregate of \$12,350.

First, as to jurisdiction: Without determining, but assuming, that this point is here properly presented, I find the facts proven sustain such jurisdiction in this court. Although Brice unquestionably had his domicile and residence without this district, yet his business without the district was that of a mere clerk; within this district, and for the entire period of six months prior to filing his petition, he was carrying on the business of a merchant upon such a scale as that his scheduled debts for merchandise and store expenses aggregated at filing of petition over \$20,000. Whether he might have filed his petition in the district of his residence is not the question here to be decided. The statute (30 Stat. 545, c. 541, § 2, par. 1) confers upon this court, as a court of bankruptcy, jurisdiction "to adjudge persons bankrupt who have had their principal place of business, resided, or had their domicile within its territorial jurisdiction for the preceding six months, or the greater portion thereof." Brice has elected to file his petition in bankruptcy in the district of his principal place of business. If he is a "person" within the meaning of the statute, this court has jurisdiction. I do not deem it necessary to here determine the question presented by counsel for Brice that the plea of minority is a plea personal to the bankrupt in this proceeding, but will assume, for the purpose of this hearing, that a creditor may properly present it. Section 4, par. 6, of the present bankruptcy statute provides that

"any person, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." By section 1, cl. 19, it is provided that the word "'persons' shall include corporations, except where otherwise provided, and officers, partnerships, and women." No part of this statute appears expressly to provide for the case of minors. *In re Derby*, 8 Ben. 118 Fed. Cas. No. 3,815, is cited by counsel for creditors petitioning for vacation as a well-considered case, wherein Judge Blatchford (then district judge, but subsequently an associate justice of the Supreme Court of the United State) decided that minors, in respect to their general contracts, are not embraced within the provisions of the Bankruptcy Act of 1867, as subjects of voluntary or involuntary bankruptcy. Opposing counsel have cited *In re Book*, 3 McLean, 317, Fed. Cas. No. 1,537, wherein it is decided, in answer to the question "whether the infancy of the applicant is good ground for opposition to his discharge as a bankrupt," that "an infant may claim the benefit of the bankrupt law." This last-cited case, while given as the "opinion of the court" on questions certified to the Circuit Court from the District Court, under the provisions of the Bankrupt Act of 1841, appears to have been answered on general principles, and not upon any special provisions of that act, and to be the opinion of Justice McLean, then a member of the Supreme Court of the United States. In neither of these cases, apparently so contrary in decision reached, is there reference as a controlling factor to any special provision of the acts in force at dates of such decisions. Yet there are apparent principles in common recognized as underlying these decisions. In the course of the opinion Judge Blatchford states, apparently as the reason leading to the conclusion reached by him:

"The general contracts of an infant having no force if disaffirmed by him after attaining his majority, it is idle for him to set forth, in a voluntary case, a schedule of his creditors, and idle for them to prove their debts during his infancy, for the whole proceedings must be in vain if the debts are disaffirmed by him after he attains his majority."

Towards the close of his opinion he states:—

"It is not intended to express an opinion as to whether or not an infant may not voluntarily petition in respect of contracts for which he is liable, such as debts for the value of necessities."

While Justice McLean states:—

"An infant is bound to pay certain debts. The bankrupt law extends its benefits to all persons who are in a state of bankruptcy, without exception as to persons. Fiduciary debtors only are excepted. . . . When an infant brings his case within the bankrupt law, the law vests his property in the assignee."

Apparently, therefore, if the infant is liable for the debts he schedules, he may, so far as the decisions above cited have expressly decided, avail himself of the benefits of the bankrupt law, in the absence in such law of any provisions to the contrary. And the point decided in *Re Derby* must be regarded as applying adversely to the

right of minors to be adjudged bankrupts only as to debts which the minor had the legal right to disaffirm. The industry of counsel has brought to the court only these two decisions as directly bearing on the question here presented. The contention presented in the pending matter may be regarded as closely analogous to the question presented under former bankruptcy statutes with reference to whether, and, if at all, to what extent, such former statutes extended their provisions to married women. The cases are numerous wherein the courts were called to determine how far the recognized legal disabilities of married women affected the application of the statute. In the pending matter the legal disability is alleged as applying to a minor. Without attempting an exhaustive consideration of the decisions relating to the application of former bankruptcy laws to married women, a few may profitably be here considered. In *Re Slichter*, Fed. Cas. No. 12,943, Judge Nelson, in 1869, passed directly on the question, arising in the district of Minnesota, over which this distinguished judge so long presided, as to the status of a married woman under the act of 1867. Catharine Slichter and her son had been trading under the firm name of Slichter & Son. This decision recognizes that the statutes of that State had relieved married women of many of the disabilities to which they were theretofore subjected, but that Mrs. Slichter could make no contract, in the course and business of said firm, except as authorized by the laws of that State. "There being no evidence that Mrs. Slichter was engaged in business by virtue of any authority conferred by the statute, she could avail herself of her coverture to defeat the debt which was the basis of the bankruptcy proceedings."

In re Kinkead, 3 Biss. 405, Fed. Cas. No. 7,824, was decided in 1873 by Judge Blodgett. This decision with exhaustive clearness applies the statutes of Illinois regarding the legal status of married women as to property rights. J. D. Kinkead and his wife, under the firm name of Kinkead & Co., were carrying on a partnership business as traders. Kinkead & Co. and J. D. Kinkead, by proceedings in involuntary bankruptcy, had been adjudicated bankrupts. An individual creditor of J. D. Kinkead sought to have his debt established against the firm assets, on the ground that the contract of co-partnership was void and inoperative by reason of the inability of the wife to make a binding contract. After a full and clear statement of the statute of the State relating to the questions involved, Judge Blodgett, in closing his opinion, states:—

"The fact that Mrs. Kinkead was not individually adjudged a bankrupt does not, in my view, change the aspect of the case. Such an adjudication could only be necessary for the purpose of reaching her individual property, if she has any, which is not alleged; and she may yet be so adjudged if it becomes necessary in the course of these proceedings."

The decision reached above was subsequently affirmed by Circuit Judge Drummond (1874), before whom the case was taken on review.

In re Collins, 3 Biss. 415, Fed. Cas. No. 3,006, was decided in 1873 by the same distinguished jurist. In this case was directly presented the question whether a married woman was entitled, on her own petition, to receive the benefits of the bankruptcy statute. The case arose upon the motion of a creditor to set aside and dismiss the bankruptcy proceedings after adjudication had thereon. After referring to the discussion had in the *Kinhead Case*, *supra*, Judge Blodgett says:

"I think the principles I have laid down in the *Kinhead Case* that a married woman could lawfully engage in business, and incur liabilities, justify her in coming to this court, and the court in taking jurisdiction of the case."

In re Goodman, 5 Biss. 401, Fed. Cas. No. 5,540, was decided by Judge Gresham in 1873, while district judge of the district of Indiana. Petition was filed against Rachel Goodman, a married woman, alleging that she had, in that district, been for years engaged in business in her own name as a trader, and had committed an act of bankruptcy (describing it) within the last six months, etc. The case came up on a motion of Mrs. Goodman to dismiss the bankruptcy proceedings. In his decision Judge Gresham states:—

"Whether this proceeding can be maintained depends upon how far the legislature of Indiana has gone in changing the common-law rights of married women."

After discussing and summarizing the Indiana statutes, the opinion concludes:—

"The rule, then, still being that a married woman cannot contract, and the power to do so being an exception to the rule, and the petition failing to show that Mrs. Goodman was possessed of any separate property or means with which she was carrying on her business, it follows that she cannot be adjudged a bankrupt. The petition is therefore dismissed."

An extended annotation to the case of *In re Kinhead*, 14 Fed. Cas. p. 602, closes with what appears to be a correct conclusion based on the cases above cited and others cited in such annotation:—

"Impossible as it may be to reconcile the decisions on the general question of the rights and liabilities of married women, the duty of the federal courts in administering the bankrupt act would seem to be simply to determine the status of a married woman under the existing laws of the State where the jurisdiction is to be exercised, and administer the act upon the basis of the principles thus discovered. The foundation of bankruptcy proceedings is indebtedness; but the bankruptcy act does not make any new standard of liability; it simply operates upon those already existing. The application of the act to married women depends, clearly, not upon their rights, but their liabilities; and those liabilities are determined by the law of the forum where the jurisdiction is invoked."¹

¹ For further American authorities, see the note referred to. Also for English authorities prior to the statute of 1870 (33 & 34 Vict. c. 93) making a married woman

While not directly applicable herein, an interesting case is *In re Cotton*, Fed. Cas. No. 3,269, wherein Judge Judson, of the district of Connecticut, applies the bankruptcy statute, as in force in 1843, to the State statutes of that State, and makes such application the decisive test whereunder he dismisses the application upon voluntary petition.

No good reason appears to me why the test above laid down may not be applied in determining to what extent, if at all, the present bankruptcy statute extends its benefits to minors. Throughout each of the cases above cited runs the query, is the person seeking or sought to be adjudged a bankrupt liable for his contracts, or for what is commonly understood to be his debts? Wherever this question is answered in the affirmative, the decision applies the bankruptcy statute, while, if answered in the negative, the application of the bankruptcy statute is denied. Turning, then, to the statutes of Iowa, we find the rights and liabilities of minors, so far as affected in the pending matter, as defined by the Iowa Code of 1897, as follows:—

“Sec. 3,188. The period of minority extends in males to the age of twenty-one years, and in females to that of eighteen years; but all minors attain their majority by marriage.

“Sec. 3,189. A minor is bound not only by contracts for necessities, but also by his other contracts, unless he disaffirms them within a reasonable time after he attains his majority, and restores to the other party all money or property received by him by virtue of the contract, and remaining within his control at any time after his attaining his majority, except as otherwise provided.

“Sec. 3,190. No contract can be thus disaffirmed where, on account of the minor's own misrepresentations as to his majority, or from his having engaged in business as an adult, the other party had good reason to believe him capable of contracting.”

How far, if at all, the matter pending is affected by manumission by the father, will not now be considered; that question not being deemed necessary to the decision reached herein. The alleged bankrupt was submitted to examination under oath on the hearing, and his testimony is before the court, together with the documentary evidence presented. His minority is conceded. There appear no express misrepresenta-

liable to be sued for and her separate property liable to satisfy debts contracted before her marriage. Under this act it was held that at least unless it were shown that a married woman had separate property she could not be made a bankrupt. *Ex parte Holland*, 9 Ch. App. 307. Nor could she be made bankrupt in respect of debts contracted after marriage, though she had a separate estate, and though by the doctrines of equity such estate was liable for such debts. *Ex parte Jones*, 12 Ch. D. 484 (C. A.). The Married Women's Property Act of 1882 (45 & 46 Vict. c. 75) greatly increased the capacity to contract and consequently the liability of married women; and a woman “carrying on a trade separately from her husband” was expressly made liable to bankruptcy. But it has been held that this case expressly provided for is the only one in which a married woman is so liable. *Re Gardiner*, 20 Q. B. D. 249; *Re a Debtor*, [1898] 2 Q. B. 576 (C. A.). And if the business is even partially under the control of the husband, the wife cannot be made a bankrupt. *Re Hellsby*, 63 L. J. Q. B. (n. s.) 261.

tions by him as to his minority. The petitioning creditors made no inquiry touching this point. No question appears to have arisen in their minds as to his being of age. They dealt with him as one of full age. He was engaged in business as an adult. From his having thus been engaged, the evidence clearly shows that these creditors had good reason to believe, and did believe, Brice was capable of contracting. There is thus met every requirement, essential under the Iowa Code, to place the debts or claims held by these creditors beyond the power of Brice to disaffirm, when he shall, in the coming December, have reached the age of twenty-one. He cannot now or then, under the Iowa statutes, disaffirm these debts; and thus he is liable therefor, as though at the time of his contracting them he had attained his majority. This conclusion satisfies the reasons underlying the above-cited cases as to married women, and it is not antagonistic to either of the cases cited as to minors, as above interpreted, and it appears just to all concerned in the results reached under it.

It becomes unnecessary formally to consider the fact, appearing on the hearing, that the petitioning creditors herein had instituted, and are now maintaining, in the State court, action as for debt against said Brice on the same claims which they set up in their petition herein as giving them the right to a vacation of the adjudication of bankruptcy. Such action in the State court is aided by attachment against the stock of merchandise, which, if the adjudication be sustained, will pass to the trustee. That such action, if prosecuted to judgment, must result in recovery for such creditors against Brice, is beyond question, under the evidence before me. The result would then be, if the petition of such creditors be sustained, and bankruptcy proceedings dismissed, that for the very debts, on account of which, in these bankruptcy proceedings, such creditors claim Brice cannot maintain these proceedings because he is not liable therefor, they would, in their action in the State court, recover judgment, because Brice is, under the Iowa statute, powerless to disaffirm, and, consequently, liable therefor. In such case the writ of attachment issued at their instance would result in paying their claim in full, to the disadvantage of other creditors, who are content to accept that equality of distribution of assets whose accomplishment is the primary object of the bankruptcy statute.

Having reached the conclusion above announced, it follows that the petition of Partridge, Wyman & Co., for vacation of order of adjudication of said Carl S. Brice as a bankrupt must be denied and dismissed, and at their costs.²

² As a general rule an infant cannot be made bankrupt either on a creditor's petition or his own. *Ex parte Sydebotham*, 1 Atk. 146; *Rex v. Cole*, 1 Ld. Raym. 443; *Ex parte Henderson*, 4 Ves. 163; *Ex parte Layton*, 6 Ves. 434, 440; *Ex parte Barwis*, 6 Ves. 601; *Ex parte Moule*, 14 Ves. 603; *Ex parte Adam*, 1 Ves. & B. 493, 494; *Stevens v. Jackson*, 4 Camp. 164; *O'Brien v. Currie*, 3 Car. & P. 283; *Belton v. Hodges*, 9 Bing. 365; *Ex parte Jones*, 18 Ch. D. 109 (C. A.); *Re Rainey*, 3 L. R. Ir. 459; *Re Dunnigan*, 95 Fed. Rep. 428; *Re Eidemiller*, 105 Fed. Rep. 595.

In *Ex parte Jones*, however, the question was left open whether an infant owing

SECTION III.

INSANE PERSONS.

IN RE FUNK.

DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT
OF IOWA, APRIL 26, 1900.

[Reported in 101 Federal Reporter, 244.]

SHIRAS, District Judge. . . . The answer presents the question whether Funk can be adjudged a bankrupt for acts done by him after the date of the adjudication of insanity, and the appointment of a guardian for his person and property. By section 8 of the bankrupt act, it is declared that "the death or insanity of a bankrupt shall not abate the proceedings, but the same shall be conducted and concluded in the same manner, so far as possible, as though he had not died or become insane." In this section provision is made for cases wherein the proceedings in bankruptcy are commenced during the lifetime of the party, or at a time preceding his becoming insane, and, in effect, the meaning of the section is that, in cases wherein the jurisdiction of the court in bankruptcy has rightfully attached, the proceedings shall not be abated by the subsequent death or insanity of the bankrupt. In cases wherein the party, although giving evidence of insanity, has not been adjudged insane, but remains in possession and control of his property, and his creditors seek his adjudication as a bankrupt, it might be held that the bankruptcy court could rightfully exercise jurisdiction, and could hold the party responsible for his acts done before the fact of his insanity had been ascertained and established; but, however this may be, it cannot be so held in cases like that now before the court, wherein it appears that, prior to the filing of the petition in bankruptcy on behalf of creditors, the party proceeded against had been adjudged to be insane by a competent court, and a guardian had been put in possession of his property. By section 3227 of the Code of Iowa, it is provided that, if the estate of an insane person "is insolvent, or will probably be

debts for necessities might not be a bankrupt. And in *Re Smedley*, 10 L. T. Rep. n. s. 432, where an infant had been arrested on an execution for damages and costs in an action of tort, and the only way of obtaining his release was by voluntary bankruptcy, the Liverpool County Court held that his petition was valid and he was adjudicated a bankrupt.

In *Farris v. Richardson*, 6 Allen, 118, it was held that proceedings under the Massachusetts Insolvent Law against an infant not represented by a guardian *ad litem* were void, though a creditor having a claim for necessities was in the court of insolvency and desired to prove his claim. The court referred to but did not decide the liability of an infant to insolvency proceedings if a guardian *ad litem* were duly appointed.

See also *Winchester v. Thayer*, 129 Mass. 129.

insolvent, the same shall be settled by the guardian in like manner and like proceedings ~~may be had, as~~ ^F are required by law for the settlement of the insolvent estate of a deceased person." Under the provisions of this section, it becomes the duty of the guardian appointed by the district court of Wright County to settle up the estate placed in his hands under the direction of the court appointing him, and it will be the duty of that court to determine the question of the validity of the liens or conveyances executed since the date of the adjudication of the insanity of the alleged bankrupt, and to make due and proper distribution of the assets belonging to the estate now in its charge. It certainly cannot be held that the present bankrupt act confers upon the courts of bankruptcy the right to settle the estates of insolvent decedents unless jurisdiction in the court of bankruptcy had attached during the lifetime of the bankrupt, and the same rule must hold good in cases wherein, before the petition has been filed in the bankrupt court, the debtor has been adjudged to be insane, and his property has been taken charge of by a State court of competent jurisdiction.¹

It is further contended by the guardian in this case that the acts of bankruptcy charged in the petition were committed after Funk had been adjudged to be insane, and that he cannot be held responsible therefor in such sense that these acts can be held to be acts of bankruptcy; and in support of this contention the ruling of Judge Dillon in the case of *In re Marvin*, 1 Dill. 178, Fed. Cas. No. 9,178, is cited, wherein it was said that "the court is of opinion that a person who is so unsound in mind as to be wholly incapable of managing his affairs cannot in that condition commit an act for which he can be forced into bankruptcy by his creditors, against the objection of his guardian"; and it would seem clear that a person who, by reason of insanity, is wholly incapable of managing his business affairs, cannot be held to have intended to violate the provisions of the bankrupt act by entering into transactions which, by reason of his mental disability, would not be binding upon him under the rules of the common law.² Under the admitted facts in this case, this court, as a court of bankruptcy, should not entertain jurisdiction of the petition filed by the creditors, and the same will therefore be dismissed, at the costs of petitioners.

¹ *Re Murphy*, 10 B. R. 48, acc.

Anon. 13 Ves. 590; *Ex parte Farr*, 10 L. T. n. s. 44; *Re Pratt*, 2 Low. 96; *Re Weitzel*, 7 Bissell, 289, *contra*. See also *Re Burka*, 107 Fed. Rep. 674.

In *Ex parte Cahen*, 10 Ch. D. 183 (C. A.), it was held that one who had been placed in a lunatic asylum by direction of his physician, but had not been found a lunatic by inquisition, could not become a voluntary bankrupt by means of a petition signed by his next friend.

In *Re Lee*, 23 Ch. D. 216 (C. A.), the court allowed the committee of a lunatic, so found by inquisition, to consent to an adjudication of bankruptcy against him. This was followed in *Re James*, 12 Q. B. D. 332 (C. A.).

² *Ex parte Friddey*, Cooke (7th ed.), 43; *Ex parte Stamp*, 1 De Gex, 345; *Re Pratt*, 2 Low. 96; *Re Weitzel*, 7 Biss. 289, also acc.

SECTION IV.

CORPORATIONS.

IN RE NEW YORK & WESTCHESTER WATER COMPANY.

DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,
JANUARY 8, 1900.

[Reported in 98 Federal Reporter, 711.]

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BROWN, District Judge. This matter arises upon a petition of various creditors of the New York & Westchester Water Company to have that corporation adjudged a bankrupt, alleging its insolvency and several acts of bankruptcy. The answer to the petition as was ruled upon the hearing of the issue, a jury trial being waived, admitted in effect the insolvency of the corporation, but denied the acts of bankruptcy alleged, and also denied the jurisdiction of the court on the ground that this corporation is not subject to the provisions of the bankrupt act (section 4b), because not "engaged principally in manufacturing, trading, printing, publishing or mercantile pursuits," as alleged in the petition. The evidence as respects the acts of bankruptcy is somewhat complicated; but from the conclusions I have arrived at on the other branches of the case, it will not be necessary to consider that subject.

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The company was incorporated under the Laws of 1873 of the State of New York, for the supply of pure and wholesome water to the village of Westchester and others, under contract with the local authorities. By an amendment of its charter in 1895, its business and powers were extended so as to include the right "to accumulate, conduct, store, furnish, buy, sell, use and deal in water for power, manufacturing and hydraulic purposes." Its water supply was derived mainly from the Hutchinson River, in Westchester County, and from wells and other sources of supply owned or leased by the company. It had some eighty miles of mains laid in the streets of the several villages supplied with water, and received, both from the public authorities, as well as from private citizens, large rentals for the supply of water distributed for private and public uses. On December 31, 1897, a contract was executed, dated December 2, with the city of New York, whereby the latter authorized this company to tap the city's Bronx River supply pipe in Yonkers, and to draw therefrom not to exceed 500,000 gallons per day, to be paid for by the corporation at the rate of 10 cents per 1,000 gallons, by assigning to the city authorities "hydrant rentals" to become due from the city for water supplied to it by the company for fire protection in the Twenty-fourth ward; with the privilege to the company of severing such connection with the supply pipe at pleasure and

of discontinuing the taking of water from the city supply, and the privilege of subsequently again making connection and resuming the use of the water, as the company might desire.

For some period preceding the trial, how long does not appear, the company had been drawing from the city's supply at about the average rate allowed of 500,000 gallons per day. This was resorted to, as I infer from the evidence, to insure a uniform distribution to the company's customers, partly in consequence of inefficiency in one of the company's pumps and machinery, and the liability to occasional breakdowns, and partly to insure a full supply.

Although the company, by the amendment to its charter, above referred to, was empowered "to buy and sell water for power, manufacturing and hydraulic purposes," this power does not appear ever to have been used, since it has never supplied, according to the testimony, any water for those purposes, nor done any commercial or mercantile business; "but has confined itself entirely to obtaining and furnishing water for the customers, cities and municipal boroughs mentioned," that is, to the residents of the villages, and to the municipal corporations referred to, for fire purposes and the supply of fire hydrants. At Pelhamville the company had sixteen driven wells; and besides the amount drawn from the city's supply pipe, the ordinary consumption from the company's own sources of supply was about 750,000 gallons daily.

I am of opinion that this water company is not within the provisions of the bankrupt act, because not "engaged principally in either trading or mercantile pursuits," in the sense in which I think those words are used. The question depends entirely upon the proper construction to be given to those words, since there are plainly no other words in the present act that could include an incorporated water company like this.

The act of 1898 is much more limited in its application to corporations than the act of 1867. By the latter act it was declared (§ 5122, Rev. St.) to "apply to all moneyed, business or commercial corporations and joint stock companies." The present act is restricted to corporations "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits."

The intention of Congress greatly to restrict the application of the present act appears manifest, not only from comparison of the phraseology of the two acts, but also from the report of the congressional conference committee upon this point, showing that at least railroad and transportation corporations and banks were intended to be omitted and left to be dealt with under the State laws. 31 Cong. Rec. p. 6247, June 28, 1898. In the recent case of *In re Cameron Town Mut. Fire, Lightning & Windstorm Ins. Co.* (D. C.), 96 Fed. 756, it was accordingly held that the present act does not apply to a mutual insurance company, and the petition in that case was dismissed. On the point here considered, Phillips, J., observes:—

"Can it be said that a company 'organized for the sole purpose of mutually insuring the property of the members, and for the purpose of paying any loss incurred by any member thereof by assessment,' is principally engaged in a mercantile pursuit? When the legislature changed the statute from 'moneyed, business, or commercial corporations' to the language 'principally engaged in mercantile pursuits,' it is to be presumed it was done for a purpose. The word 'mercantile,' in its ordinary acceptation, pertains to the business of merchants, and has 'to do with trade, or the buying and selling of commodities.' A merchant is one who traffics, or who buys and sells goods or commodities. . . . The term 'mercantile pursuit' necessarily carries with it the idea of traffic, the buying of something from another or the selling of something to another, and is allied to trade. This concern has nothing in its business of the character of mercantile pursuit." 96 Fed. 757, 758.

The case of a water company like this, obtaining by purchase about two-fifths of the supply which it furnishes to its customers, is not so clearly excluded as a mutual insurance company. But in each case as it arises the limitations imposed by the act must be carefully observed. No such corporation can be subjected to the operation of the bankrupt law, nor can the court acquire jurisdiction over it, unless it is found to be "engaged principally in trading or mercantile pursuits." These words must be interpreted in the sense in which they are commonly used and received, and not in any strained or unnatural sense for the purpose of including or of excluding particular corporations.

In Bouv. Law Dict. a trader is defined as "one who makes it his business to buy merchandise or goods and chattels and to sell the same for the purpose of making a profit." Black, Law Dict., says: "One whose business is to buy and sell merchandise or any class of goods deriving a profit from his dealings;" and the weight of authority seems to be, that the proper description of the business of a trader includes both buying and selling, either goods or merchandise, or other goods ordinarily the subject of traffic. Per Lord Ellenborough, in *Sutton v. Weeley*, 7 East, 442; *Thompson, C. J.*, in *Wakeman v. Hoyt*, 28 Fed. Cas. 1351; *Lowell, J.*, in *Re Chandler*, 4 N. B. R. 213, 5 Fed. Cas. 447; *In re Smith*, 2 Low. 69, 22 Fed. Cas. 395; *Love v. Love*, 15 Fed. Cas. 999.

The words "mercantile pursuits" may have a little broader signification than "trading." "Mercantile" is defined by the Century Dictionary as "having to do with trade or commerce; of or pertaining to merchants, or the traffic carried on by merchants; trading; commercial." It signifies for the most part the same thing as the word "trading;" and by "mercantile pursuits" is meant the buying and selling of goods or merchandise or dealing in the purchase and sale of commodities, and that, too, not occasionally or incidentally, but habitually as a business. *Norris v. Com.*, 27 Pa. St. 494; *Com. v. Natural Gas Co.*, 32 Pittsb. Leg. J. 310.

Selling merely the natural products of one's own land, it has been held, does not constitute trading, or a mercantile pursuit, even though some yearly purchases may be made by the seller in order to keep up his regular supply. *In re Woods*, 7 N. B. R. 128, Fed. Cas. No. 17,990; *Port v. Turton*, 2 Wils. 169; *In re Cleland*, 2 Ch. App. 466; *Ex parte Gallimore*, 2 Rose, 424. These terms are restricted also to dealings in merchandise, goods or chattels, the ordinary subjects of commerce; so that a railroad contractor, or a speculator in stocks, whether on his own account, or as broker, is not deemed a trader or merchant. *In re Smith*, 2 Low. 69, 22 Fed. Cas. 395; *In re Marston*, 5 Ben. 313, 16 Fed. Cas. 857; *In re Woodward*, 8 Ben. 563, 30 Fed. Cas. 542; *In re Moss*, 19 N. B. R. 132, 17 Fed. Cas. 901, per Choate, J. It has also been held that incidental purchases or sales by a person not otherwise a trader, will not make him such. Lord Eldon, *Ex parte Gallimore*, 2 Rose, 424; *Patten v. Browne*, 7 Taunt. 409; *In re Duff* (D. C.), 4 Fed. 519, per Choate, J.; *In re Kimball* (C. C.), 7 Fed. 461, per Lowell, J.

No doubt the powers of a corporation are to be determined by its charter and by the statutes applicable to it. The amendment of the charter of this corporation authorized it "to buy, sell, use and deal in water for power, manufacturing and hydraulic purposes." As above stated, however, the evidence is that it did not furnish water for these purposes, and under the bankrupt act the question is, not how extensive the company's powers may be, but in what pursuits the corporation is in fact principally engaged, and whether these pursuits are principally trading or mercantile.

In view of the above definitions and precedents, it seems to me a strained and unnatural use of terms to describe the ordinary business of a water-supply company as a "trading or mercantile pursuit." In common parlance, I think such a business would never be so described; and if only those corporations are subject to the bankrupt act that are engaged in "trading or mercantile pursuits" in the commonly received meaning of those words, I do not see how water-supply companies can fairly be held to be within the act. In the case of *First Nat. Bank v. Council Bluffs City Waterworks Co.*, 56 Hun, 412, 9 N. Y. Supp. 859, the court observes: "This water company was not a trading or banking corporation."

This view is confirmed by observing more particularly the precise nature of such a company's business, its undertaking, its methods, and its mode of compensation.

Its business is to obtain pure water, and by means of mains and pipes, to transport it from its sources, often through long distances, under considerable pressure, so as to serve its customers by a running stream at the elevations desired.

Water is a natural product. In its natural condition it is not usually considered merchandise. At the sources of supply, when the company's plant is once established, the water itself costs little or

nothing. In its natural state, it has no commercial value. When bottled or enclosed in casks and put upon the market, it becomes a commodity, and is a subject of trade and commerce in the proper sense. But that is not the business, nor would that meet the requirements of a water-supply company. Such a company does not sell water as a commodity deliverable from hand to hand in specific quantities, or at any specific price. The characteristic feature of the business, as I have said, is to transport the water as a running stream and in its natural condition, from the sources of supply to the elevations at which it is to be served. Its cost to the company is chiefly the cost of transportation under pressure; and what its customers pay to the company is not the price of any specific amount of water, as upon a direct sale, but for the use of the company's transportation service, in the form of rentals for the privilege of tapping its mains or pipes and drawing therefrom. The rentals no doubt vary with reference to the number and size of pipes used and the amount of water liable to be drawn; but when fixed, the rentals are payable irrespective of the particular amount drawn, or whether any water is drawn or not.

These circumstances seem wholly to distinguish the business of a water company from a trading or mercantile pursuit, as those words are commonly understood. The leading idea of the company is, not to trade or traffic in water as merchandise, but to transport it under pressure from distant sources to the consumer in the form above stated, renting out privileges to draw from its pipes. This characteristic feature naturally brings such companies within the classification of transportation companies, among which it is recognized and classified by the Laws of New York, in the revision of the laws entitled, "An act in relation to transportation corporations, excepting railroads. Laws 1890, c. 566. This chapter treats of ferry, navigation, stage-coach, tramway, pipe-line, water-works, gas and electric light, telegraph and telephone, turnpike, plank-road and bridge corporations. This statutory classification is, I think, founded upon the true conception of the main functions of the company, which excludes it from the class of trading or mercantile pursuits intended by the bankrupt act.

The contract with the city by which the company recently secured about two-fifths of the water supplied by it to the different villages and municipal corporations for private and public uses, certainly does not change the essential character of its business, nor make it principally engaged in trading or commercial pursuits. That was but a single contract incidental to the general purpose of the corporation, and to enable it to furnish a regular and unfailing supply through its mains, but terminable at pleasure when its machinery and other sources of supply should be more complete.

Considerable has been said in argument on the question whether water companies like this, incorporated under the act of 1873, are quasi public corporations, exercising in some degree a governmental

agency. So far as any such claim might exempt these corporations from taxation, it was rejected by the court of appeals in the Case of the Mills Waterworks Co., 97 N. Y. 97. The language of Danforth, J., in delivering the opinion of the court in that case, seems to deny the exercise by such companies of any public functions whatever, or that the company's means are devoted to any public use, or other than simply to the earning of money for the corporation's own use. The general language employed seems to go beyond the requirements of the case. It is, however, well settled in other cases that such companies do subserve a public use so far as to justify the exercise of the right of eminent domain; and that the uses they subserve are none the less public, because procured through private enterprise. *Water Co. v. Stanley*, 39 Hun, 424, 426, affirmed in 103 N. Y. 650; *Waterworks Co. v. Bird*, 130 N. Y. 249, 259, 29 N. E. 246. And the same view has been frequently expressed in the federal courts. *San Diego Land & Town Co. v. City of National City*, 174 U. S. 739, 755, 19 Sup. Ct. 804, 43 L. Ed. 1154; *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Mfg. Co.*, 115 U. S. 650, 669, 6 Sup. Ct. 252, 29 L. Ed. 516; *Walla Walla Water Co. v. City of Walla Walla*, (C. C.) 60 Fed. 957, 960.

I do not attach much importance, however, to any *quasi* public character, more or less, that water companies may have in consequence of the public uses they subserve. For the franchises of this company, by its contract with the local authorities, are assignable; so that there is nothing to prevent the exercise of its functions by any transferee to whom its powers might pass through bankruptcy proceedings, if lawfully subject to the operation of the bankrupt act. For the reasons previously stated, however, I do not think this company is within the act, and the petition is, therefore, dismissed.¹

¹ A corporation whose business is mining and selling ore or metal obtained therefrom, or coal, cannot be made an involuntary bankrupt under B. A. 1898. *Re Elk Park Mining Co.*, 101 Fed. Rep. 422; *Re Victoria Zinc Mining Co.*, 102 Fed. Rep. 984; *Re Rollins Gold & Silver Mining Co.*, 102 Fed. Rep. 982; *Re Chicago-Joplin Lead & Zinc Co.*, 104 Fed. Rep. 67; *Re Woodside Coal Co.*, 105 Fed. Rep. 56. Nor can a construction company. *Re Minnesota, etc. Construction Co. (Ariz.)* 60 Pac. Rep. 881. Nor a mutual insurance corporation. *Re Cameron, etc. Ins. Co.*, 96 Fed. Rep. 756. Nor a corporation incorporated for giving theatrical performances. *Re Oriental Soc.*, 104 Fed. Rep. 975. But a corporation operating a private hospital for profit was held within the terms of the act. *Re San Gabriel Sanatorium*, 95 Fed. Rep. 271.

SECTION V.

WAGE EARNERS AND FARMERS.

IN RE LUCKHARDT.

DISTRICT COURT FOR THE DISTRICT OF KANSAS, MAY 19, 1900.

[Reported in 101 Federal Reporter, 807.]

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Hook, District Judge. This is a proceeding in involuntary bankruptcy, brought on January 9, 1900, by a number of mercantile firms and corporations, creditors of the alleged bankrupt. It is set forth in the petition, among other things, that Luckhardt is insolvent, and that on or about November 1, 1899, he conveyed, transferred, concealed, and removed a part of his property with intent to hinder, delay, and defraud his creditors, and that, while insolvent, he transferred a portion of his property to one or more of his creditors, with intent to prefer them over his other creditors. The alleged bankrupt has filed an answer, in which he does not deny the essential allegations in the petition, but sets up in bar to the relief prayed for by petitioners that from August 4, 1899, up to the filing of the petition he was, and is still, engaged chiefly in farming. Testimony has been taken on the part of the alleged bankrupt in support of his answer, and it is submitted to the court as upon a demurrer of the petitioning creditors to the evidence. It appears from the testimony that Luckhardt had been engaged in the retail boot and shoe business at Boonville, Mo., for about five years prior to March, 1899, and in that month he removed his stock of goods to North Topeka, Kan., and continued the same business there. In August, 1899, he determined to sell his stock, and quit the business, but he nevertheless continued the conduct thereof until the latter part of October, 1899. He continued to sell at retail in the usual and customary way, and to replenish his stock by purchases of new goods from time to time until the 26th of October, 1899. There was no apparent difference in the conduct of his business during the months of September and October from that of the previous period. The father-in-law of the alleged bankrupt died in April, 1899, seised of a farm in Missouri, consisting of 137 acres of land, which, upon his death, became the property of his widow, daughter, and two grandchildren, the offspring of a deceased son. The daughter is the wife of Luckhardt, the alleged bankrupt. About the 4th of August, 1899, Luckhardt and his family and his mother-in-law, who had come to Kansas, and lived with him, returned to Missouri, and went on the farm. He stayed there about a month, then returned to Topeka, where he remained a month. He then went back to the farm, and stayed a couple of weeks, and then returned to Topeka, where he remained until

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early in November. He then again returned to the farm, and has remained there ever since. During his absence from Kansas his boot and shoe business was left in charge of a clerk. On the 26th of October he sold his entire stock of merchandise, which invoiced \$6,370 in bulk, for \$2,870 in cash and 160 acres of land in Kansas, which was taken by him at \$3,500. This land he sold to his wife, but it does not appear what he received for it. Luckhardt testified that the proceeds of the sale received by him were in part disposed of as follows: \$628 was paid on a note held at Boonville, Mo., upon which his father, mother, and wife were sureties; \$200 was paid to his brother upon a note held by the latter; \$500 was paid to his mother, who lives in Oregon, Mo.; and from \$60 to \$75 was paid to a man in Topeka, Kan. None of his merchandise creditors were paid. During the cross-examination of Luckhardt, in which counsel for the petitioning creditors evidently desired to show an absence of good faith in the defence set up in the answer, he declined to testify as to what he did with the remainder of the money received by him, saying that he could not answer without his books. Upon being requested to produce his books so that he could answer, his counsel objected to a postponement of the taking of the depositions to enable him to do so, and the notary sustained the objection. He also said that he could not even approximate the amount of his indebtedness, and that he could not tell how long it had been, and upon which he claims to be engaged in his farming operations, had been rented to a tenant for one-half of the crop raised thereon. Luckhardt did not know whether the term of the tenant had expired when he went on the farm on the 4th of August, 1899. He says he leased the farm from his mother and wife verbally, and that the terms of the arrangement were that he should give them one-half of the crop raised on the place. He immediately sublet to the former tenant all of the tillable land except a portion for oats, for half of the crop raised thereon. When he received the crop rent from the tenant, he was to turn it over to his wife and mother-in-law on account of the rent due from him to them. He retained for the use of his family and himself the house and about 35 acres of pasture and meadow land, and some of the cultivated land for oats. It is upon this situation and under these circumstances that the alleged bankrupt claims immunity from the proceeding against him.

The bankrupt act provides that "any natural person except a wage earner or a person chiefly engaged in farming or the tillage of the soil . . . may be adjudged an involuntary bankrupt," etc. Section 4 b. The act is remedial in its nature and purposes, and is, therefore, not to receive a strict interpretation, but is rather to be construed reasonably, and with a view to effect its objects and to promote justice. The exemption from involuntary proceedings in favor of wage earners and persons engaged chiefly in farming or the tillage of the soil is not intended as a means of escape for insolvents whose property was

acquired and whose debts were incurred in other occupations recently engaged in. If the right of the creditors to institute involuntary proceedings may be thus defeated by the debtors within the period allowed for the commencement of such proceedings, it could be defeated by a change of occupation made coincidently with the commission of an act of bankruptcy, and an insolvent debtor would thus be permitted to dispose of his stock of merchandise or other property, distribute the proceeds thereof in such manner as pleased him, immediately become for the time being a tiller of the soil, or a wage earner "at a rate of compensation not exceeding \$1,500 per year," and so avoid the operation of the bankrupt act. Such a result is not in accord with the purpose nor within the spirit of the law. A petition in an involuntary proceeding must be filed within four months after the commission of the act of bankruptcy relied on, and if an insolvent, who is engaged in an occupation which is within the purview of the law, has committed an act rendering him amenable to its provisions, and desires within such period to adopt one of the callings favored by the law, and exempted from its operation in respect of involuntary proceedings, he should not be permitted to carry with him the property previously accumulated, to the defrauding of pre-existing creditors. The excepted occupations are not designed as a refuge for insolvent debtors laden with property and fleeing from other callings. The right of the creditors to proceed within the period limited after the commission of an act of bankruptcy cannot be thus defeated by the debtor. This interpretation is in entire harmony with the spirit and object of the law, and is in accord with the plain principles of right and justice, and it prevents the perversion of provisions designed for the favor and protection of those who are in good faith wage earners or tillers of the soil. Let an order be entered adjudging the said William Luckhardt to be a bankrupt.¹

¹ A person engaged chiefly in raising cattle and hogs is a farmer within the statute. *Re Thompson*, 102 Fed. Rep. 287.

An involuntary petition should state the defendant's business, or that he is not a farmer or wage earner. *Re Taylor*, 102 Fed. Rep. 728 (C. C. A.).

CHAPTER III.

WHO MAY BE PETITIONING CREDITORS.

RE W. B. ALEXANDER. RE J. F. ALEXANDER.

DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, SEPTEMBER, 1870.

[Reported in 1 Lowell, 470.]

BANKRUPTCY.¹ These petitions for involuntary bankruptcy against the several defendants were tried together by consent of the parties. The defendant, James F. Alexander, bought out the stock in trade of the petitioner, O'Connell, in February, 1869, for about twenty-four hundred dollars: of which five hundred dollars was paid down, and for the remainder the two defendants gave their joint and several promissory notes on one, two, three, and four years, with interest at eight per cent a year, payable semi-annually, secured by a mortgage on the stock in trade. William B. Alexander, the father of the other defendant, had no interest in the purchase, but joined in the notes for the greater security of the petitioner, and, as between the two defendants, as a surety only.

In February, 1870, the first note became due and was paid, together with the interest on the whole debt. The next note will be payable in February, 1871. On the thirteenth of February, 1870, the father conveyed his dwelling-house and land at East Boston to his wife. He was not and never had been a trader, and he had no other estate or effects liable to seizure on execution, and owed no debts excepting to this petitioner. In March the son conveyed to his wife a dwelling-house and land which had stood in his name for about two years. Evidence was admitted, *de bene*, to show that he held the house by gift from his father-in-law, upon an oral trust or understanding that it should be used, enjoyed, and conveyed for the benefit of the grantor's family, including the defendant's wife. The conveyance to the wife was made without the consent or knowledge of the father-in-law, who heard of it but lately, not long before this petition was filed, and testified that he acquiesced in the arrangement. This defendant owed no debts of any consequence, excepting the mortgage debt, and one to his aunt, of whom he borrowed the five hundred dollars paid out in the first instance

¹ A portion of the opinion, in which it was decided that the gift made by W. B. Alexander to his wife was an act of bankruptcy, and in which the court suggested that the parties compromise, is omitted.

towards the purchase of this stock. The evidence tended to show that this debt would not be pressed against him.

LOWELL, J. Several points of law have been ably discussed before me, and I will consider them in their order.

D 1. The fact that the petitioner's debt is not yet payable is not a valid answer to this proceeding. By section 39 all creditors whose debts are provable under the act may petition; and by section 19 debts existing but not payable until a future day, are provable. It was so under the act of 1841: *Barton v. Tower*, 5 Law Reporter, 214; and the practice has always been so under the insolvent law of this commonwealth. It would be a sad defect in a bankrupt law if the rights of creditors depended on the time at which their debts matured.¹

2. The next objection is that a creditor who holds security cannot petition. Here an important distinction is to be noted. This creditor has no security upon the property of W. B. Alexander, and the language of section 20 is that a creditor who holds security upon the property of the bankrupt shall be admitted to prove only for the balance, &c. This would seem to show that the petitioner has a provable debt for the full amount against the estate of the father, because his only security is on the estate of the son. Such has always been the practice in England, and I am much inclined to think it the true practice. If the surety pays the debt, he may be entitled to the benefit of the collateral security. But in bankruptcy it seems more just and equitable that the creditor should have the benefit of all his remedies, so that he may obtain his whole debt if possible. If he is obliged to realize his security, and prove only for a balance, he will be losing the advantage for which he has stipulated, of the full credit of the surety. A contrary doctrine appears to have prevailed in Massachusetts: *Lancton v. Wolcott*, 6 Met. 305; but I am not prepared to say that I could follow that precedent, nor that the statutes are precisely alike on this point. Judge Fox has ably vindicated what I believe to be the true doctrine under the bankrupt law. It is not necessary to decide the question in this case, for reasons which will presently appear.²

f. 26, 3. The next question is whether a creditor who holds a mortgage upon the property of his debtor can proceed against that debtor himself by petition in bankruptcy. By section 20 such a petitioner can be a

¹ In England, under the earlier statutes and also under the Bankruptcy Act of 1869, it was held that a petitioning creditor's debt must be due and payable at the time of the petition. But under the Act of 1883, now in force, a debt payable *in futuro* is sufficient. Robson on Bankruptcy (7th ed.), 205, 206.

In the United States the doctrine of *Re Alexander* as to this point is settled. *Re Ouimette*, 3 B. R. 566; *Linn v. Smith*, 4 B. R. 46; *Re King*, 1 N. Y. Leg. Obs. 276.

By the English law, it is also necessary that the debt of the petitioning creditor should have been contracted before the act of bankruptcy alleged in the petition. Robson, 210. This rule was approved in *Re Mullen, Deady*, 513; and see *Re Bruckmann* *infra*, 159.

² As to how far a creditor, holding security from another than the bankrupt, has a provable claim, see *infra* Chapter VI.

creditor only for the balance, after deducting the value of the property, ^F which value is to be ascertained by agreement with the assignee, or by a sale under direction of the court. The argument is that until an assignee is appointed it cannot be legally ascertained whether such a mortgagee is really a creditor or not. ² ~~This appears to me too strict and literal a construction.~~ Take the case of an admitted act of bankruptcy, and of creditors whose security is plainly inadequate. Are they to be without remedy? No better illustration than this case affords could be desired. If this creditor cannot petition there is no other person who is interested to do so, and after the six months have passed he is without remedy. I have known a case in which all the creditors were secured, and none of them adequately. The true intent and equity of the statute will be met by holding that when the security falls short of a full indemnity, by two hundred and fifty dollars, or more, thus leaving the amount of a petitioning creditor's debt practically unsecured, the debt is sufficient. This will be a question of fact like any other, and no more difficult to decide than such as often arise on a disputed account or other debt sufficient in kind. This is the law of England by the express words of 24 & 25 Vict., c. 134, § 97. I do not wish to be understood that a creditor holding collateral security may not petition, if he offers to surrender and cancel his security, nor that any security by attachment or other lien created by law would usually be a bar; but my opinion is that full and adequate security created by contract must be abandoned, and that if inadequate it must be so to the extent above mentioned.¹

4. It is no defence in bankruptcy that the petitioner is the only creditor, nor that he has an adequate remedy at law or in equity in the State or federal courts. The bankrupt law protects all creditors, and is additional to other remedies in all the cases to which it applies. This creditor alleges in his petition, and has proved to my satisfaction, that his security falls short by more than two hundred and fifty dollars, and I must hold him entitled to proceed.²

¹ A creditor having security from the bankrupt may be a petitioning creditor as to the excess of his claim above the security: Eng. B. A. 1883, § 6; B. A. 1898, § 59; or he may waive the security and petition as if unsecured: *Re Rankin*, 1 B. R. 647; *Re Bloss*, 4 B. R. 147; *Re Stansell*, 6 B. R. 183; *Re Sheehan*, 8 B. R. 345; *Re Frost*, 6 Biss. 213, 217.

² *Conf. Ex parte English Bank*, L. R. 6 Ch. 79; *Re Sheehan*, 8 B. R. 353; *Re Johann*, 2 Biss. 139; *O'Neil v. Glover*, 5 Gray, 144.

IN RE ROMANOW.

DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS,
MARCH 10, 1899.

[Reported in 92 Federal Reporter, 510.]

IN bankruptcy.

Sumner H. Foster, for petitioning creditors.

A. S. Cohen, for respondents.

LOWELL, District Judge. This case raises several interesting questions concerning the right of certain alleged creditors of the respondents to file a petition in voluntary bankruptcy against them.

F The act of bankruptcy alleged is a general assignment made October
F 4, 1898. One or more of the petitioners assented to this assignment,
2 and the respondents object that persons so assenting cannot be parties
D to the petition. The objection is valid. By accepting the assignment,
the creditors released their claims against the respondents, and, in
place thereof, accepted claims under the assignment. Though the assignment is an act of bankruptcy, and is avoided by the adjudication, yet it is not a void instrument, but only a voidable one. Until the adjudication it is valid, and the assenting creditors are bound by their assent thereto. Hence, it follows that, until adjudication, the persons who had assented to the assignment had ceased to be creditors of the respondents. If this argument be thought too technical, then it may be said that those who have become voluntary parties to the assignment, and have thus agreed to a settlement of the respondents' affairs thereunder, cannot equitably repudiate their agreement. This view was taken in the only case bearing upon the subject which I have been able to find, — *Perry v. Langley*, 19 Fed. Cas. 282, 283 (No. 11,006) :¹

"If the proof was that Perry had advised the making of the assignment, or after its execution had expressly given his assent to it, as a creditor of Langley, he would have been precluded from insisting on it as an act of bankruptcy, and could not have maintained a standing in this court as a petitioning creditor."

The petition was filed January 28, 1899. On February 14, Breitstein, a creditor of the respondents, appeared and sought to join in the

¹ This has been uniformly held in many cases in England and America. *Lowell on Bankruptcy*, 35, n. 7; *Simonson v. Sinsheimer*, 95 Fed. Rep. 948 (C. C. A.), overruling the contrary opinion expressed in *Re Curtis*, 91 Fed. Rep. 737.

Assent given in ignorance of facts making the assignment fraudulent will not estop the creditor. *Ex parte Marshall*, 1 Mont. D. & De G. 575; *Ex parte Hallowell*, 3 Mont. & Ayr. 538; *Re Curtis*, 94 Fed. Rep. 630 (C. C. A.). See also *Leidigh Carriage Co. v. Stengel*, 95 Fed. Rep. 637 (C. C. A.).

An agreement to compromise which has not been carried out does not work an estoppel. *Ex parte Foster*, 22 Ch. D. 797; *Artman v. Truby*, 130 Pa. 619; *Simonson v. Sinsheimer*, 95 Fed. Rep. 948 (C. C. A.).

petition. The respondents object that he cannot be counted in making up the necessary number of creditors required by section 59 of the bankrupt act. Paragraph *f* of that section reads as follows: —

"Creditors other than original petitioners may, at any time, enter their appearance, and join in the petition, or file an answer, and be heard in opposition to the prayer of the petitioners." *f*

Those who are permitted to "join in" a petition, by so doing commonly become parties to it; and the words "join in the petition," as used in paragraph *e* and paragraph *b* of the same section, plainly carry that implication. It is urged by the respondents that, if this construction be given to paragraph *f*, an insufficient number of creditors, or creditors having an insufficient amount of claims, may file a petition against a debtor, and obtain an adjudication by subsequently procuring other creditors to join with them, such joinder being possible at any time before the petition is dismissed. This practice, it is said, would permit a petition, at the time of its filing insufficient in substance as well as in form, to be made good by subsequent acts. It must be admitted that there is weight in this argument, but the language of the act is clear; and the inconvenience, if inconvenience there be, was not deemed by Congress a controlling consideration in the act of 1867 (see Rev. St. §§ 5021, 5025), nor in some cases, at least, under the act of 1898. See section 59 *b*. I think, therefore, that creditors, otherwise competent to appear and join in a petition subsequent to its filing, may be reckoned in making up the number of creditors and amount of claims required by section 59. *p*

The respondents further object that Breitstein's appearance was entered more than four months after the act of bankruptcy complained of; but this seems immaterial. Section 3 *b* provides that the petition may be filed within four months of the act of bankruptcy. The petition was filed on January 29, and that remains the date of its filing, though some petitioners have joined in it subsequently thereto. For instance, the date of bankruptcy is defined by section 1 subd. 10., to be the date when the petition was filed. If an adjudication is made in this case, the date of bankruptcy will be January 29, though the adjudication be made upon the petition of one or more creditors who joined therein in the month of February. Respondents adjudged bankrupt.

IN RE MINER.

DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

[Reported in 104 Federal Reporter, 520.]

LOWELL, District Judge. In this case the respondents made a general assignment, which has been assented to by all the creditors, with *f*

two or three exceptions. One of the non-assenting creditors has filed this petition alone, alleging that all the creditors of the respondents are less than twelve in number, thus seeking to bring himself within section 59 b. It was admitted at the argument that the creditors who had assented to the assignment could not join in the petition, but it was urged that they should be counted in reckoning the number of the respondents' creditors. Under the act of June 22, 1874 (18 Stat. 178, § 12), it was held that preferred creditors should not be reckoned, in computing the proportion of creditors required to join in a petition. *In re Israel*, Fed. Cas. No. 7,111; *Clinton v. Mayo*, Fed. Cas. No. 2,899; *In re Currier*, 2 Low. 436, Fed. Cas. No. 3,492. In the last case Judge Lowell said, "I add, therefore, to the reasons already given why the debt of Dana & Co. should not be counted, that they ought not to join in this petition." The learned judge thus considered that only those creditors who can join in a petition should be reckoned in computing the proportion who must join in order to make the petition valid. This is in accordance with the language of the statute; for otherwise the word "creditors" in the first line of section 59 b. would have a different meaning from the same word in the third line of the same clause. Again in the same clause it is said that "one of such creditors" (that is to say, one of the creditors who are less than 12 in number) may file a petition, thus plainly implying that the creditors who may file a petition are identical with the creditors whose number is to be reckoned. It is not necessary to decide if the general assignment here made be a preference. In *West Co. v. Lea*, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098, 1 Nat. Bankr. N. 409, a general assignment is said to be repugnant to the policy of the bankruptcy law, and to show an intent to delay, defeat, and hinder the execution of the act. See also *In re Gutwillig*, 1 Nat. Bankr. N. 554, 34 C. C. A. 377, 92 Fed. 337. If this assignment had provided for a preference, the petitioners' case would be clearly on that ground. If the debtor is not thrown into bankruptcy, their preference stands, and the law is evaded. In re Israel, supra. Here, if the debtor is not thrown into bankruptcy, the assignment stands, and the law is evaded. Even if a preference be morally less objectionable than a general assignment, yet I am of opinion that the latter is so objectionable to the spirit of the act that those creditors who have assented to it are within the scope of the remarks made concerning preferred creditors in the cases above cited. For these reasons, because such is the letter of the act, because such was the construction of an analogous provision in the act of 1867, and because such seems to me the fair intent of the act as a whole, I hold that the creditors who have assented to the assignment are not to be

reckoned in the computation required by section 59 b. Adjudication to be made.

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IN RE BRINCKMANN.

DISTRICT COURT FOR THE DISTRICT OF INDIANA, JULY 9, 1900.

[Reported in 103 Federal Reporter, 65.]

BAKER, District Judge. On May 3, 1900, George P. Chadwick, of F Laporte County, Ind., filed a petition in involuntary bankruptcy against Robert Brinckmann, of the same county and State. The petition alleges that Chadwick is a creditor of said Brinckmann, having provable claims amounting in the aggregate, in excess of securities held by him, to the sum of \$500, and that the creditors of said Brinckmann are less than twelve in number. The petitioner alleges that the debt owing by the alleged bankrupt to himself is a judgment rendered F January 29, 1900, by the circuit court of Marshall County, Ind., for \$1,250, for a wilful and malicious injury to the person of the petitioner committed by said Brinckmann on July 15, 1899. He alleges that there is interest due on said judgment from the date of its rendition, and costs of suit taxed in said cause, amounting to \$140.20. The petitioner alleges that said Brinckmann is insolvent, and that within four months next preceding the date of the filing of his petition said Brinckmann committed acts of bankruptcy, in that he did on January F 3 and 15, 1900, convey, mortgage, and transfer all of his real and personal property to Louisa Brinckmann, William Brinckmann, Herman Brinckmann, and James F. Gallaher, with intent to prefer them as creditors over his other creditors, and especially the petitioner, and that said Brinckmann also conveyed, transferred, and concealed his property with intent to hinder, delay, and defraud his creditors. Said Brinckmann filed an answer putting in issue all the material averments of the petition. The court has heard the evidence adduced by the respective parties, and is of opinion that the petitioner was not a creditor of the alleged bankrupt at the time that the acts of bank- D ruptcy were committed. It is shown by the evidence, without dispute, that the case of the petitioner against the alleged bankrupt for the recovery of damages for the malicious and wrongful assault and battery was not tried until January 13, 1900, on which day the jury returned a verdict in his favor for \$1,250, on which verdict on January 29, 1900, a judgment was rendered for the amount of the verdict and costs by the Circuit Court of Marshall County, Ind. No one except a creditor can maintain a petition in involuntary bankruptcy. The petitioner in this case at the time of the commission of the alleged acts of bankruptcy was not a creditor having a provable claim against the alleged bankrupt. Section 1, cl. 9, of the bankruptcy act defines a "creditor" as follows:

"(9) Creditor shall include any one who owns a demand or claim provable in bankruptcy and may include his duly authorized agent, attorney or proxy."

Section 63, cl. "b," provides as follows:

"(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct and may thereafter be proved and allowed against his estate."

The petitioner's claim at the time the alleged acts of bankruptcy were committed was unliquidated. He had not at that time reduced his claim for damages for a tort into judgment. It remained an unliquidated claim until judgment was rendered on the verdict. In the case of *Beers v. Hanlin*, 3 Am. Bankr. R. 745, 99 Fed. 695, it is held that an unliquidated claim is not a provable debt in bankruptcy, and one arising out of tort must first be reduced to judgment, or, pursuant to application to the court, be liquidated, as the court shall direct, in order to be proved; and it is further held that where the only alleged creditor is one who had an unliquidated claim for tort, not reduced to judgment at the time of an alleged preferential transfer, he is not a creditor who can insist that such transfer is an act of bankruptcy. The case of *Ex parte Charles*, 14 East, 197, 16 Ves. 256, is a much stronger case against the petitioning creditor than the case last cited. The case was sent by Lord Chancellor Eldon to the Court of King's Bench. The facts stated by the chancellor for the opinion of the court were that an action upon the case was brought by Mary Howell against one John Charles for breach of promise of marriage, in which she obtained a verdict on December 5, 1808, for £150, in damages. On December 25, 1808, the act of bankruptcy was committed by an assignment by the alleged bankrupt of all of his effects. Judgment on the verdict was entered January 31, 1809. On February 4, 1809, Mary Howell petitioned for a commission of bankruptcy, which issued on February 21, 1809, upon the debt evidenced by her judgment. The case was elaborately argued before the entire court on the certificate sent to it by the chancellor; the question being whether or not Mary Howell, at the time of the commission of the alleged act of bankruptcy, owned a provable debt, and was a creditor, within the true construction of the bankruptcy act. The court unanimously certified to the chancellor that the debt was not a sufficient debt to support a commission. Afterwards, in the sittings after Trinity Term, 1812, upon the petition of the bankrupt, the commission was superseded, with costs. In *Scott v. Ambrose*, 3 Maule & S. 327, Lord Chief Justice Ellenborough said that all the courts in Westminster Hall had concurred in the doctrine of the case of *Ex parte Charles*. The petitioner not having been a creditor owning a provable claim at the time of the commission of the alleged acts of bankruptcy, cannot maintain his present petition. It will therefore be dismissed at the costs of the petitioner.¹

¹ *Re Morales*, 105 Fed. Rep. 761, likewise held an unliquidated claim insufficient to support a petition.

A contingent debt is not enough to support a petition. See *Ex parte Page*, 1 Gl. & J. 100; *Sigsby v. Willis*, 3 B. R. 207.

CHAPTER IV.

ACTS OF BANKRUPTCY.

SECTION I.

FRAUDULENT CONVEYANCES.¹

STATUTE 13 ELIZABETH, c. 5. 1570.

For the avoiding and abolishing of feigned, covinous and fraudulent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, more commonly used and practised in these days than hath been seen or heard of heretofore: (2) which feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, have been and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, not only to the let or hinderance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevisance between man and man, without the which no commonwealth or civil society can be maintained or continued:

II. Be it therefore declared, ordained and enacted by the authority of this present parliament, That all and every feoffment, gift, grant, alienation, bargain and conveyance of lands, tenements, hereditaments, goods and chattels, or of any of them, or of any lease, rent, common or other profit or charge out of the same lands, tenements, hereditaments, goods and chattels, or any of them, by writing or otherwise, (2) and all and every bond, suit, judgment and execution, at any time had or made sithence the beginning of the Queen's majesty's reign that now is, or at any time hereafter to be had or made, (3) to or for any intent or purpose before declared and expressed, shall be from henceforth deemed and taken (only as against that person or persons, his or their heirs, successors, executors, administrators and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, by such guileful, covinous or fraudulent devices and practices, as is aforesaid, are, shall or might be in any wise disturbed, hindred, delayed or defrauded) to be clearly and utterly void, frustrate and of none effect; any pretence, colour, feigned

¹ For convenience of treatment the subject of conveyances fraudulent as to creditors is dealt with in this section as a whole.

consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.

III. And be it further enacted by the authority aforesaid, That all and every the parties to such feigned, covinous or fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions and other things before expressed, and being privy and knowing of the same, or any of them; (2) which at any time after the tenth day of *June* next coming shall wittingly and willingly put in ure, avow, maintain, justify or defend the same, or any of them, as true, simple, and done, had or made *bona fide* and upon good consideration; (3) or shall alien or assign any the lands, tenements, goods, leases or other things before-mentioned, to him or them conveyed as is aforesaid, or any part thereof; (4) shall incur the penalty and forfeiture of one year's value of the said lands, tenements and hereditaments, leases, rents, commons or other profits, of or out of the same; (5) and the whole value of the said goods and chattels; (6) and also so much money as are or shall be contained in any such covinous and feigned bond; (7) the one moiety whereof to be to the Queen's majesty, her heirs and successors, and the other moiety to the party or parties grieved by such feigned and fraudulent feoffment, gift, grant, alienation, bargain, conveyance, bonds, suits, judgments, executions, leases, rents, commons, profits, charges and other things aforesaid, to be recovered in any of the Queen's courts of record by action of debt, bill, plaint or information, wherein no essoin, protection or wager of law shall be admitted for the defendant or defendants; (8) and also being thereof lawfully convicted, shall suffer imprisonment for one half year without bail or mainprise.

VI. Provided also, and be it enacted by the authority aforesaid, That this act, or anything therein contained, shall not extend to any estate or interest in lands, tenements, hereditaments, leases, rents, commons, profits, goods or chattels, had, made, conveyed or assured, or hereafter to be had, made, conveyed or assured, which estate or interest is or shall be upon good consideration and bona fide lawfully conveyed or assured to any person or persons, or bodies politick or corporate, not having at the time of such conveyance or assurance to them made, any manner of notice or knowledge of such covin, fraud or collusion as is aforesaid; anything before mentioned to the contrary hereof notwithstanding.¹

¹ It is generally held that such conveyances as are within this statute would be invalid without the aid of a statute. Co. Litt. 290 b; Cadogan v. Kennett, 2 Cowp. 432; Baker v. Humphrey, 101 U. S. 494, 499; Anderson v. Hooks, 9 Ala. 704; Allen v. Rundle, 50 Conn. 9, 32; Peck v. Land, 2 Ga. 1, 10; Ewing v. Runkle, 20 Ill. 448, 461; Gardner v. Cole, 21 Ia. 205, 210; Doyle v. Sleeper, 1 Dana, 531, 533; Hall v. Sands, 52 Me. 358; Blackman v. Wheaton, 13 Minn. 326, 330; Edmonson v. Meacham, 50 Miss. 34; Sands v. Codwise, 4 Johns. 536; Seymour v. Wilson, 19 N. Y. 417, 420; O'Daniel v. Crawford, 4 Dev. 197, 202; Clark v. Douglass, 62 Pa. 408, 416; Hudnal v. Wilder, 4 McCord, 294; Russell v. Stinson, 8 Hayw. 1, 5; Davis v. Turner, 4 Gratt. 422.

SECTION I. (*continued*).

(a) SALES AND TRANSFERS FOR VALUE.

TWYNE'S CASE.

STAR CHAMBER, 1602.

[*Reported in 3 Coke, 80 b.*]

IN an information by Coke, the Queen's Attorney General, against Twyne of Hampshire, in the Star-Chamber, for making and publishing of a fraudulent gift of goods, the case on the stat. of 13 Eliz. cap. 5, was such: Pierce was indebted to Twyne in four hundred pounds, and was indebted also to C. in two hundred pounds. C. brought an action of debt against Pierce, and pending the writ, Pierce being possessed of goods and chattels of the value of three hundred pounds, in secret made a general deed of gift of all his goods and chattels real and personal whatsoever to Twyne, in satisfaction of his debt; notwithstanding that Pierce continued in possession of the said goods, and some of them he sold; and he shored the sheep, and marked them with his own mark: and afterwards C. had judgment against Pierce, and had a *fieri facias* directed to the Sheriff of Southampton, who by force of the said writ came to make execution of the said goods; but divers persons, by the command of the said Twyne, did with force resist the said Sheriff, claiming them to be the goods of the said Twyne by force of the said gift; and openly declared by the commandment of Twyne, that it was a good gift, and made on a good and lawful consideration. And whether this gift on the whole matter was fraudulent and of no effect by the said act of 13 Eliz. or not, was the question. And it was resolved by Sir THOMAS EGERTON, Lord Keeper of the Great Seal, and by the Chief Justice POPHAM and ANDERSON, and the whole court of Star Chamber, that this gift was fraudulent, within the statute of 13 Eliz. And in this case divers points were resolved:

1st. That this gift had the signs and marks of fraud, because the gift is general, without exception of his apparel, or any thing of necessity; for it is commonly said, *quod dolus versatur in generalibus*.

2d. The donor continued in possession and used them as his own; and by reason thereof he traded and trafficked with others, and defrauded and deceived them.

3d. It was made in secret, *et dona clandestina sunt semper suspiciosa*.

4th. It was made pending the writ.

5th. Here was a trust between the parties, for the donor possessed all, and used them as his proper goods, and fraud is always apparelled and clad with a trust, and a trust is the cover of fraud.

6th. The deed contains, that the gift was made honestly, truly, and *bona fide*; *et clausulæ in consuet' semper inducunt suspicionem*.

Secondly, it was resolved, that notwithstanding here was a true debt due to Twyne, and a good consideration of the gift, yet it was not within the proviso of the said act of 13 Eliz. by which it is provided, that the said act shall not extend to any estate or interest in lands, &c. goods or chattels made on a good consideration and *bona fide*; for although it is on a true and good consideration, yet it is not *bona fide*, for no gift shall be deemed to be *bona fide* within the said proviso which is accompanied with any trust; as if a man be indebted to five several persons, in the several sums of twenty pounds, and hath goods of the value of twenty pounds, and makes a gift of all his goods to one of them in satisfaction of his debt, but there is a trust between them, that the donee shall deal favorably with him in regard of his poor estate, either to permit the donor, or some other for him, or for his benefit, to use or have possession of them, and is contented that he shall pay him the debt when he is able; this shall not be called *bona fide* within the said proviso; for the proviso saith on a good consideration, and *bona fide*; so a good consideration doth not suffice, if it be not also *bona fide*; and therefore, reader, when any gift shall be to you in satisfaction of a debt, by one who is indebted to others also; 1st, Let it be made in a public manner, and before the neighbors, and not in private, for secrecy is a mark of fraud. 2d, Let the goods and chattels be appraised by good people to the very value, and take a gift in particular in satisfaction of your debt. 3d, Immediately after the gift, take the possession of them; for continuance of the possession in the donor is a sign of trust. And know, reader, that the said words of the proviso, on a good consideration, and *bona fide*, do not extend to every gift made *bona fide*; and therefore there are two manners of gifts on a good consideration, *scil.* consideration of nature or blood, and a valuable consideration. As to the first, in the case before put, if he who is indebted to five several persons, to each party in twenty pounds, in consideration of natural affection, gives all his goods to his son, or cousin, in that case, forasmuch as others should lose their debts, &c. which are things of value, the intent of the act was, that the consideration in such case should be valuable; for equity requires that such gift, which defeats others, should be made on as high and good consideration as the things which are thereby defeated are; and it is to be presumed, that the father, if he had not been indebted to others, would not have dispossessed himself of all his goods, and subjected himself to his cradle; and therefore it shall be intended that it was made to defeat his creditors; and if consideration of nature or blood should be a good consideration within this proviso, the statute would serve for little or nothing, and no creditor would be sure of his debt. And as to gifts made *bona fide*, it is to be known, that every gift made *bona fide*, either is on a trust between the parties, or without any trust, every gift made on a trust is out of this proviso;

for that which is betwixt the donor and the donee, called a trust *per nomen speciosum*, is in truth, as to all the creditors, a fraud, for they are thereby defeated and defrauded of their true and due debts. And every trust is either expressed, or implied; an express trust is, when in the gift, or upon the gift, the trust by word or writing is expressed: a trust implied is, when a man makes a gift without any consideration, or on a consideration of nature, or blood only: and therefore, if a man before the stat. of 27 H. 8 had bargained his land for a valuable consideration to one and his heirs, by which he was seised to the use of the bargainee; and afterwards the bargainor, without a consideration, infeoffed others, who had no notice of the said bargain; in this case the law implies a trust and confidence, and they shall be seised to the use of the bargainee: so in the same case, if the feoffees, in consideration of nature, or blood, had without a valuable consideration infeoffed their sons, or any of their blood who had no notice of the first bargain, yet that shall not toll the use raised on a valuable consideration; for a feoffment made only on consideration of nature or blood shall not toll an use raised on a valuable consideration but shall toll an use raised on consideration of nature, for both considerations are *in æquali jure*, and of one and the same nature.

And when a man, being greatly indebted to sundry persons, makes a gift to his son, or any of his blood, without consideration, but only of nature, the law intends a trust betwixt them, *scil.* that the donee would, in consideration of such gift being voluntarily and freely made to him, and also in consideration of nature, relieve his father, or cousin, and not see him want who had made such gift to him, *vide* 33 H. 6. 33, by Prisot, if the father infeoffs his son and heir apparent within age *bona fide*, yet the lord shall have the wardship of him: so note, valuable consideration is a good consideration within this proviso; and a gift made *bona fide* is a gift made without any trust either expressed or implied: by which it appears, that as a gift made on a good consideration, if it be not also *bona fide*, is not within the proviso; so a gift made *bona fide*, if it be not on a good consideration, is not within the proviso; but it ought to be on a good consideration, and also *bona fide*.

To one who marvelled what should be the reason that acts and statutes are continually made at every parliament without intermission, and without end; a wise man made a good and short answer, both which are well composed in verse.

“Quæritur, ut crescant tot magna volumina legis?
In promptu causa est, crescit in orbe dolus.”

And because fraud and deceit abound in these days more than in former times, it was resolved in this case by the whole court, that all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud. . . .

EDWARDS v. HARBEN.

KING'S BENCH, 1788.

[*Reported 2 Term Reports, 587.*]

ASSUMPSIT for goods sold to the defendant's testator. The defendant pleaded that he was not executor, nor had ever administered as such; and, secondly, that he had fully administered, &c. Replication, that he had administered divers goods, &c. of the testator; and issue thereon. And to the second plea, that the defendant, at the time of exhibiting the plaintiff's bill, had, and still has, goods and chattels of the deceased in his hands sufficient to satisfy the plaintiff's demands; and issue thereon. At the trial of the last assizes at East-Grinstead, Sussex, a verdict was found for the plaintiff, with £22 18s. 6d. damages, and 40s. costs, subject to the opinion of this court on the following case. William Tempest Mercer in his lifetime, and before the time of the execution of the bill of sale hereinafter mentioned, was indebted to the plaintiff in the sum of £22 18s. 6d. for goods sold and delivered, which sum still remains due to the plaintiff. William Tempest Mercer, at the time of the execution of the said bill of sale, was likewise indebted to the defendant in the sum of £191 for money lent. On the 27th of March, 1786, Tempest Mercer offered to the defendant a bill of sale of his goods, household furniture, and stock in trade, in his house at Lewes, by way of security for the said debt. The defendant refused to accept of the same, unless he should be at liberty to enter upon the effects and sell them immediately after the expiration of fourteen days from the execution thereof, in case the money should not be sooner paid; to which Tempest Mercer agreed, and accordingly on the same day executed a bill of sale in the common form, by which Mercer bargained and sold to the defendant for ever his household furniture, medicines, stock in trade [particularly specifying them], and all and every other the goods, chattels, and effects whatsoever, in and about his dwelling-house and premises at Lewes. Immediately upon the execution of the bill of sale, possession was delivered to the defendant in the manner described therein, viz., by the delivery of one corkscrew in the name of the whole, but in no other manner whatsoever. All the effects described in the bill of sale remained in the possession of William Tempest Mercer until the time of his death, which happened on the 7th of April, 1786. On the 8th of April, 1786, being before the expiration of fourteen days from the execution of the bill of sale, the defendant entered and took possession of the effects contained in the bill of sale, being then in the house of the deceased, and afterwards sold the same for £236 7s. 5d. William Tempest Mercer died intestate; and no letters of administration were taken out to the deceased by the defendant, or by any other person, before the commencement of this action. The question for the opinion of the court is, Whether the defendant be entitled to retain the produce of

the said effects, or at least the value of £191, the consideration of the said bill of sale; or whether the bill of sale be void as against the creditors of William Tempest Mercer; and the plaintiff in this action be entitled to recover his debt of £22 18s. 6d. against the defendant, as executor *de son tort*?

Partington, for the plaintiff.

Steele, for the defendant.

BULLER, J. This is an action brought by the plaintiff, who is a creditor of Mercer, against the defendant as executor. It does not appear by the case that any other goods than those mentioned in the bill of sale came to the defendant's hands. The bill of sale is dated on the 27th March, 1786, and is a general bill of sale of all the defendant's household furniture and stock in trade. This bill of sale is to take effect immediately on the face of it: but there was an agreement between Mercer and the defendant, that the goods should not be sold till the expiration of fourteen days from the date of its execution; and no possession was actually taken till after the death of Mercer, which happened within the fourteen days: but there was a formal delivery of a corkscrew in the name of the whole. On this case two questions arise: First, whether this bill of sale be void or not; and secondly, if void, whether the defendant by having taken these goods under the bill of sale, made himself liable as an executor *de son tort*. The first question came before the court in the late term in the case of *Bamford v. Baron*, on a motion for a new trial from the Northern circuit; and after hearing that case argued, we thought it right to take the opinion of all the judges upon it. Accordingly we consulted with all the judges, who are unanimously of opinion that unless possession accompanies and follows the deed, it is fraudulent and void; I lay stress upon the words "accompanies and follows," because I shall mention some cases where, though possession was not delivered at the time, the conveyance was not held to be fraudulent. There are many cases on this subject; from which it appears to me that the principle which I have stated never admitted of any serious doubt. So long ago as in the case in *Bulstrode*, the court held that an absolute conveyance or gift of a lease for years, unattended with possession, was fraudulent; but if the deed or conveyance be conditional, there the vendor's continuing in possession does not avoid it, because by the terms of the conveyance the vendee is not to have the possession till he has performed the condition. Now here the bill of sale was on the face of it absolute, and to take place immediately, and the possession was not delivered; and that case makes the distinction between deeds or bills of sale which are to take place immediately, and those which are to take place at some future time. For in the latter case the possession continuing in the vendor till that future time, or till that condition is performed, is consistent with the deed; and such possession comes within the rule, as accompanying and following the deed. That case has been universally followed by all the cases since. One of the

strongest is quoted in *Bucknal and Others v. Roiston*, Pr. in Chan. 287; there one Brewer, having shipped a cargo of goods, borrowed of the plaintiff £600 on bottomry, and at the same time made a bill of sale of the goods, and of the produce and advantage thereof, to the plaintiff. There Sir E. Northey cited a case, "where a man took out execution against another; by agreement between them the owner was to keep the possession of them upon certain terms, and afterwards obtained another judgment against the same man, and took the goods in execution; and it was held that he might, and that the first execution was fraudulent and void against any subsequent creditor, because there was no change of the possession, and so no alteration made of the property." And he said it had been ruled forty times in his experience at Guildhall, that, if a man sells goods, and still continue in possession as visible owner of them, such sale is fraudulent and void as to creditors, and that the law has been always so held. The Lord Chancellor held in the principal case that the trust of those goods appeared upon the very face of the bill of sale. That though they were sold to the plaintiffs, yet they trusted Brewer to negotiate and sell them for their advantage, and Brewer's keeping possession of them was not to give a false credit to him as in other cases which had been cited, but for a particular purpose agreed upon at the time of the sale. So that the Chancellor in that case proceeded on the distinction which I have taken; he supported the deed, because the want of possession was consistent with it. This has been argued by the defendant's counsel as being a case in which the want of possession is only evidence of fraud, and that it was not such a circumstance *per se* as makes the transaction fraudulent in point of law: that is the point which we have considered, and we are all of opinion that if there be nothing but the absolute conveyance without the possession, that in point of law is fraudulent. On the other hand there are cases where the vendor has continued in possession, and the bill of sale has not been adjudged fraudulent, if the want of immediate possession be consistent with the deed. Such was the case of *Lord Cadogan v. Kennet*, Cowp. 432, because there the possession followed the deed. So also the case of *Haselinton and Another v. Gill*, Tr. 24 Geo. 3, B. R. post. 3, vol. 620 *n*, and another, sheriff of Middlesex; there personal property, consisting (*inter alia*) of some cows, was settled on the marriage of the plaintiff's wife on certain trusts; and the court held that only those which were purchased after the marriage could be taken to satisfy the debts of the husband. The second question then is, Whether the defendant's having taken possession of these goods after Mercer's death, though under the bill of sale, will make him an executor *de son tort*? The two cases, which were cited by the plaintiff's counsel, are decisive of this point. In 2 Bac. Abr. 605, it is said, "If a man make a deed of gift of his goods in his lifetime by covin to oust his creditors of their debts, yet after his death the vendee shall be charged for them." There too the possession was delivered to the

vendee. To support this doctrine, 13 H. 4. 4. b, Rol. Abr. 549, are both quoted. Then in what manner shall he be charged? He can only be charged as executor; because any intermeddling with the intestate's effects makes him so. The cases in Cro. Jac. and Yelv. cited at the bar prove it, and state the manner in which he shall be charged. There is also another strong case on this point in Dyer (Dy. 166 b). In short, every intermeddling after the death of the party makes the person so intermeddling an executor *de son tort*, *Vid. ante* 97. S. P.

GROSE, J., observed that it was unnecessary to repeat what had been said from the bench, but said that he was perfectly satisfied that the law was as had been stated.

Postea to the plaintiff.

The court then made the rule absolute for granting a new trial in the case of Bamford v. Baron.¹

¹ In many jurisdictions in this country it is enacted or judicially decided that retention by the seller of the possession of personal property after a sale is conclusive proof of fraud. CALIFORNIA, Civ. Code, § 3440; *George v. Pierce*, 123 Cal. 172; COLORADO, 1 Mills Annot. Stats., § 2127; *Stanley v. Citizens' Coal Co.*, 24 Col. 103; CONNECTICUT, *Hatatal v. Blakeslee*, 41 Conn. 302; *Huebner v. Smith*, 62 Conn. 186; DELAWARE, Code, c. LXIII, § 4; *Bowman v. Herring*, 4 Harr. 458; IDAHO, Rev. Stat. § 3021; *Harkness v. Smith*, 2 Idaho, 952; *Hallett v. Parrish*, 51 Pac. Rep. 109; ILLINOIS, *Bass v. Pease*, 79 Ill. App. 308; IOWA, Code, § 1923; *Harris v. Pence*, 91 Ia. 481; KENTUCKY, *Morton v. Ragan*, 5 Bush, 334 (*conf. Vanmeter v. Estill*, 78 Ky. 456); MARYLAND, Code, Art. 21, § 40; *Franklin v. Clafin*, 49 Md. 24; MISSOURI, Rev. Stats. 1889, § 5178; *State v. Goetz*, 131 Mo. 675; *Revercomb v. Duker*, 74 Mo. App. 570; MONTANA, Civ. Code, § 4491; *Yank v. Bordeaux*, 23 Mont. 205; NEVADA, Comp. Laws, § 292; *Estey v. Cooke*, 12 Nev. 276; *Tognini v. Kyle*, 17 Nev. 209; NEW HAMPSHIRE, *Coolidge v. Melvin*, 42 N. H. 510; *Parker v. Marvell*, 60 N. H. 30; OKLAHOMA, Stats. § 2663; PENNSYLVANIA, *Stephens v. Gifford*, 137 Pa. 219; *Garretson v. Hackenburgh*, 144 Pa. 107; *Lehr v. Brodbeck*, 192 Pa. 535 (*conf. Ditman v. Raule*, 124 Pa. 225); SOUTH DAKOTA, Comp. Laws, § 4657; *Howard v. Dwight*, 8 S. Dak. 398; UTAH, Comp. Laws, 1888, § 2837; *White v. Pease*, 15 Utah, 170; VERMONT, *Weeks v. Prescott*, 53 Vt. 57; *Wheeler v. Selden*, 63 Vt. 429; WASHINGTON, Gen. Stats. § 1454; *Whiting Mfg. Co. v. Gephart*, 6 Wash. 615. So in ONTARIO, Rev. Stat. Ont. c. 119, § 5; *McMaster v. Garland*, 31 Up. Can. C. P. 320. The Federal courts apply the law of the State where the transaction took place. *Dooley v. Pease*, 60 U. S. App. 248.

In Illinois this rule does not apply where retention of possession is consistent with the provisions of the deed of transfer or bill of sale. *Bass v. Pease*, 79 Ill. App. 308. But generally in these States there is no such limitation to the rule. See statutes cited above and *Swift v. Thompson*, 9 Conn. 63; *Coolidge v. Melvin*, 42 N. H. 510; *Stephens v. Gifford*, 137 Pa. 219; *Post Publishing Co. v. Insurance Co.*, 189 Pa. 301.

It is immaterial that the objecting creditor had knowledge of the sale. *Bassinger v. Spangler*, 9 Col. 175, 186; *Harkness v. Smith*, 2 Idaho, 952; *Lawrence v. Burnham*, 4 Nev. 361; *Warwick Iron Co. v. First Nat. Bank*, 13 At. Rep. 79 (Pa.); *Hart v. Farmer's Bank*, 33 Vt. 252, 263; *Perrin v. Reed*, 35 Vt. 28; *contra*, *Lowe v. Matson*, 140 Ill. 108; *Sachler Carriage Co. v. Dryden*, 71 Ill. App. 583; *Vanmeter v. Estill*, 78 Ky. 456. In the case last cited the creditor gave credit after notice, and this was relied on as the ground of decision. In the other cases this was not the case, but apparently the time when the claim arose was not regarded as material.

By the statutes of Iowa, Maryland, Washington and Ontario, if a bill of sale is recorded, the transaction is valid though the vendee retains possession, in analogy to the common provisions in regard to chattel mortgages.

MARTINDALE v. BOOTH.

KING'S BENCH, 1832.

[Reported in 3 *Barneswall & Adolphus*, 498.]

TRESPASS for taking away and converting furniture, goods, and chattels of the plaintiffs. Plea, not guilty. At the trial before Lord TENNERDEN, C. J., at the Middlesex Sittings after Trinity Term 1829, the jury found a verdict for the plaintiffs for £93, 16s., subject to the opinion of this court on the following case: —

Before the 8th of May, 1828, one W. G. Priest, who kept the Peacock Tavern in Maiden Lane, Middlesex, was indebted to the plaintiffs, wine and spirit merchants, in £10 for wine and spirits. Priest having applied to them for a further supply of wine upon credit, and for a loan of money, the plaintiffs refused to give him any further credit, or to lend him any money unless he would give them satisfactory security. Priest then proposed to execute a bill of sale to them of the furniture and fixtures in the Peacock Tavern as such security, and the plaintiffs agreed to give him credit thereupon to the extent of £200. After Priest and the plaintiffs had agreed to give and accept such security, but before the bill of sale was actually executed, the plaintiffs, upon the faith of such agreement, advanced to Priest £30 in money, and to the amount of £60 in wine and spirits, and in two days afterwards, viz. the 8th of May, 1828, in pursuance of the agreement, Priest executed and delivered to the plaintiffs a bill of sale, reciting that he, Priest, was indebted to the plaintiffs in the sum of £100 for money advanced and goods sold and delivered, and stating that, in consideration thereof, he granted, bargained, sold, and assigned unto the plaintiffs all the household goods, furniture, &c. in and about the premises called the Peacock Tavern, to hold to the proper use and behoof of the plaintiffs forever, subject to the condition thereafter contained: proviso, that if Priest should pay the said sum of £100 with lawful interest thereon by instalments, that is to say, £25 on the 7th of June then next, £25 on the 7th of May next, and £50, the residue thereof, on the 7th of November, 1829, the deed should be void; but in default of payment of all or any of the said sums at the times appointed, then it should be lawful, although no advantage should have been taken of any previous default, for the plaintiffs forthwith to enter upon the premises, and take possession of the goods, furniture, &c., and absolutely sell and dispose of the same. There was a power reserved to the plaintiffs, during the continuance of the deed, to enter upon the premises and take an inventory; and also at any time after default as aforesaid to take and retain possession of the goods until they should deem it expedient to sell. Then followed a proviso, “that until default should be made in payment of all or any of the said sums, it should be lawful for Priest to retain and keep quiet possession of all and singular the said household goods, &c.”

Before Priest commenced dealing with the plaintiffs, he had married the widow of one Higman, who formerly kept the Peacock Tavern, and who, at the time of his death, was indebted to Combe, Delafield, and Co. in the sum of £1,100. His widow being executrix of his will, on her marriage with Priest they both became possessed of Higman's effects; and Priest, by way of security for the said £1,100, executed a warrant of attorney to Combe, Delafield, and Co. for that amount in November, 1823. On the 1st of November, 1828, Messrs. Combe, Delafield, and Co. caused judgment to be entered upon the warrant of attorney, and sued out a writ of *fi. fa.* directed to the defendants Booth and Copeland, then sheriff of Middlesex, who thereupon issued their warrant to Wilson, the other defendant, their officer, and he seized and took in execution the goods in question, being the furniture and effects in the Peacock Tavern. While the sheriff remained in possession, the plaintiffs came upon the premises, gave the defendants notice of the bill of sale, and required them to relinquish possession, which was refused, and the sheriff sold the goods. This case was now argued by

Archbold, for the plaintiffs.

Comyn, contra.

LORD TENTERDEN, C. J. I am of opinion that the deed of sale was not absolutely void. Much has been said as to the secrecy attending that transfer, but the observation applies with equal force to the warrant of attorney, which was unknown to the plaintiffs, and which Combe and Co. forbore to act upon for so long a time. The consideration for the bill of sale was not only an antecedent debt, but a sum of money to be advanced by the plaintiffs to enable Priest to carry on his trade. The omission of the plaintiffs to take possession of the goods was perfectly consistent with the deed; for it was stipulated that Priest should continue in possession until default made in payment of all or any of the instalments, and that on such default it should be lawful, although no advantage should have been taken of any previous default, for the plaintiffs to enter and take possession of the household goods and furniture. The possession by Priest, therefore, being consistent with the deed, and it having been given in consideration of money advanced to enable Priest to carry on his trade, I cannot say that it was absolutely void.

PARKE, J. I am of the same opinion. I think that the want of delivery of possession does not make a deed of sale of chattels absolutely void. The dictum of BULLER, J., in *Edwards v. Harben*, 2 T. R. 587, has not been generally considered, in subsequent cases, to have that import. The want of delivery is only evidence that the transfer was colorable. In *Benton v. Thornhill*, 2 Marshall, 427, it was said in argument, that want of possession was not only evidence of fraud, but constituted it; but GIBBS, C. J., dissented; and although the vendor there, after executing a bill of sale, was allowed to remain in possession, GIBBS, C. J., at the trial, left it to the jury to say, whether, under all the circumstances, the bill of sale were fraudulent or not. It is laid down in *Sheppard's Touchstone*, 224 (7th ed.), "that a bargain and sale may be made of

goods and chattels without any delivery of any part of the things sold ; " and, afterwards, in page 227, it is said " that the word gift is often applied to moveable things, as trees, cattle, household stuff, &c., the property whereof may be altered as well by gift and delivery as by sale and grant, and this is, or may be, either by word or writing ; " and in a note to this passage by the editor it is said, " that, by the civil law, a gift of goods is not good without delivery, yet in our law it is otherwise, when there is a deed : also in a *donatio mortis causa*, there must be a delivery." Then it is evident that the bill of sale, in this case, without delivery, conveyed the property in the household goods and chattels to the plaintiffs. It may be a question for a jury, whether, under the circumstances, a bill of sale of goods and chattels be fraudulent or not ; and if there were any grounds for thinking that a jury would find fraud here, we might, this being a special case, infer it ; but there is no ground whatever for saying that this bill of sale was fraudulent. It was given for a good consideration, for money advanced to Priest to enable him to carry on his trade, and his continuance in possession was in terms provided for.

*Judgment for the plaintiffs.*¹

¹ LITTLEDALE and PATTESON, JJ., delivered concurring opinions.

It is well settled in England that retention of possession by the seller is at most evidence tending to show fraud. V. C. Kindersley, in *Hale v. Metropolitan, &c. Co.*, 28 L. J. Ch. N. S. 777, 779, laid down the rule as follows : " With respect to the question whether the sale was *bona fide*, it was at one time attempted to lay down rules that particular things were indelible badges of fraud, but, in truth, every case must stand on its own footing ; and the court or the jury must consider whether, having regard to all the circumstances, the transaction was a fair one and intended to pass the property for a good and valuable consideration." See also *Lindon v. Sharp*, 6 M. & G. 898 ; *Pennell v. Dawson*, 18 C. B. 355 ; *Alton v. Harrison*, L. R. 4 Ch. App. 622 ; *Macdonald v. Swiney*, 8 Ir. C. L. R. 73.

The question has been made of much less importance in England than formerly, however, by the Bills of Sales Acts. Those now in force are 41 & 42 Vict. c. 31 ; 45 & 46 Vict. c. 43 ; 53 & 54 Vict. c. 53 ; 54 & 55 Vict. c. 35. These require that bills of sale, whether given in an absolute sale or as security, shall be registered as a condition of their validity against third persons, if possession is not transferred. But transactions effected by parol are not within the scope of the acts.

In this country the prevailing doctrine, in the absence of statutes is that retention of possession is *prima facie* evidence of fraud, but that the *bona fides* of the transaction may be shown. FEDERAL COURTS, *Crawford v. Neal*, 144 U. S. 585 ; ALABAMA, *Troy Fertilizer Co. v. Norman*, 107 Ala. 667 ; ARIZONA, *Liebes v. Sleffy*, 32 Pac. Rep. 261 ; ARKANSAS, *Smith v. Jones*, 63 Ark. 232 ; DISTRICT OF COLUMBIA, *Justh v. Wilson*, 19 D. C. 529 ; FLORIDA, *Briggs v. Weston*, 36 Fla. 629 ; GEORGIA, *Collins v. Taggart*, 57 Ga. 355 ; INDIANA, Rev. Stat. 1891, § 4911 ; *Seavey v. Walker*, 108 Ind. 78 ; *Higgins v. Spahr*, 145 Ind. 167 ; KANSAS, Gen. Stat. (1889) § 3163 ; *Locke v. Hedrick*, 24 Kan. 763 ; LOUISIANA, *Cochrane v. Gibert*, 41 La. Ann. 735 ; MAINE, *Goodwin v. Goodwin*, 90 Me. 23 ; MASSACHUSETTS, *Brooks v. Powers*, 15 Mass. 244 ; *Allen v. Wheeler*, 4 Gray, 123 ; MICHIGAN, Comp. Laws (1897) § 9520 ; *Jansen v. McQueen*, 105 Mich. 199 ; MINNESOTA, Gen. Stat. (1894) § 4219 ; *Cortland Wagon Co. v. Sharvy* ; MISSISSIPPI, *Hilliard v. Cagle*, 46 Miss. 309 ; NEBRASKA, Comp. Stat. 1881, c. 32, § 11 ; *Powell v. Yeazel*, 46 Neb. 225 ; NEW JERSEY, *Miller v. Pancoast*, 5 Dutch. 250 ; NEW YORK, *Southard v. Benner*, 72 N. Y. 424 ; *Brown v. Harmon*, 29 App. Div. 31 ; NORTH CAROLINA, *Rea v. Alexander*, 5 Ired. 644 ; *Cheatham v. Hawkins*, 80 N. C. 161 ; NORTH DAKOTA, Rev. Code, § 5053 ; *Conrad v. Smith*, 6 N. Dak. 337 ; OHIO, *Hombeck v. Vanmetre*, 9 Ohio, 153 ; *Freeman v. Rawson*, 5 Ohio St. 1 ; OREGON, Code Civ. Proc. § 766,

DARVILL v. TERRY.

EXCHEQUER, MAY 7, 1861.

[Reported in 6 Hurlstone & Norman, 807.]

THIS was an interpleader issue, to try whether certain goods, taken in execution by the sheriff of Surrey, under a writ of *fi. fa.* issued on a judgment recovered by George Terry (the now defendant) against one Beaty, were at the time of the seizure the property of the now defendant, as against James Darvill (the now plaintiff.)

At the trial, before CHANNELL, B., at the Middlesex Sittings in the present term, the following facts appeared: On the 9th of January, 1861, Beaty executed a bill of sale, by way of mortgage, of certain goods in his possession, as a security for £130, previously lent him by the plaintiff, and a further loan of £160. By the terms of the deed the above sums were to be repaid, with interest at the rate of £5 per cent, on the 29th of July, 1861, and until default in payment Beaty was to keep possession of the goods. There was an indorsement on the deed of the receipt of the £160 by Beaty, on the 9th of January, 1861, but the money was not, in fact, paid, nor the execution attested, until the 11th of January, the bill of sale having remained until that time in the hands of the attorney who prepared and attested it. The bill of sale was registered, under the 17 & 18 Vict. c. 36, as if executed on the 9th of January. On the 16th of January Beaty presented a petition to the Court of Bankruptcy for an arrangement with his creditors, and obtained an order for protection of his person and goods from process until the 12th of February. On the 29th of January this petition was dismissed, and on the same day the sheriff seized the goods of Beaty under a writ of *fi. fa.* issued on a judgment obtained against him by the now defendant.

It was submitted on behalf of the defendant, first, that the bill of sale was not executed *bona fide*, and with the intention of vesting the property in the goods in the plaintiff, but was a mere contrivance for the purpose of defeating the defendant's execution, and consequently void under the 13 Eliz. c. 5. Secondly, that the consideration money not having been paid until two days after the bill of sale was executed, there was no valid registration under the 17 & 18 Vict. c. 36, s. 1.¹

subd. 40; McCully v. Swackhammer, 6 Ore. 438; RHODE ISLAND, Mead v. Gardiner, 13 R. I. 257; SOUTH CAROLINA, Peggall v. Miller, 21 S. C. 385; TENNESSEE, Grubbs v. Greer, 5 Coldw. 160; TEXAS, Edwards v. Dixon, 66 Tex. 613; Traders Nat. Bank v. Day, 87 Tex. 101; VIRGINIA, Davis v. Turner, 4 Gratt. 422; Benjamin v. Madden, 94 Va. 66; WEST VIRGINIA, Bindley v. Martin, 28 W. Va. 773; Poling v. Flaanagan, 41 W. Va. 191; WISCONSIN, Rev. Stat. (1878) § 2310; Densmore Com. Co. v. Shong, 98 Wis. 380.

¹ Portions of the opinions of the court holding this registration valid have been omitted.

The learned judge left it to the jury to say whether, taking all the circumstances into consideration, the bill of sale was *bona fide*—the transaction it purported to be, or merely colorable. If they were of opinion that it was the intention of the parties that the goods should continue to be the goods of Beaty, and that the bill of sale was resorted to for the purpose of defeating the defendant's execution, and without any intention that the property should pass to the plaintiff, then the bill of sale, though good in form, would be void; and (as described by counsel) a mere "sham" or contrivance of no avail in law. But if the jury were of opinion that the parties really intended that which the transaction purported to be, viz., in consideration of money advanced, to pass the property in the goods to the plaintiff, though with the right in Beaty to retain possession of the goods until default in payment of the money advanced, it was no objection to the bill of sale that the parties had come to that arrangement with a view of defeating the defendant's execution. The jury found that the transaction was *bona fide*, and a verdict was entered for the plaintiff.

Montagu Chambers now moved for a rule to show cause why a new trial should not be had on the ground of misdirection.

POLLOCK, C. B. I am of opinion that there ought to be no rule. The objection to the direction of the learned judge is based on two grounds. First, it is said that he did not sufficiently point out to the jury that the bill of sale, if given to defeat a judgment creditor, was void as against him. But there are many circumstances under which a conveyance by a debtor of his property is valid, although its object is to defeat creditors. The most remarkable case is where a debtor voluntarily assigns over his property for the benefit of his creditors; and such assignment is valid, though made for the express purpose of defeating a particular creditor. Here, if the mortgage was *bona fide* for the consideration of £160, and the money was actually paid, the transaction may well be sustained under the present view of the law (which has varied from that as laid down in the earlier cases), although the intention was to defeat an execution creditor. In the case of *Wood v. Dixie*, 7 Q. B. 892, Coltman, J., laid down the law precisely as Mr. Chambers says that it ought to have been laid down in the present case, but the ruling of the learned judge was corrected by the Court of Queen's Bench.¹

MARTIN, B. I am also of opinion that there ought to be no rule. The first point raised by Mr. Chambers was expressly decided in the case of *Wood v. Dixie*, 7 Q. B. 892, which was determined in the

¹ In this case COLTMAN, J., told the jury that "if there really was a payment, still if the intention of the transaction was to defeat the execution creditor, the conveyance was void as against him," but the court held that a sale of property for good consideration is not, either at common law or under the statute 13 Eliz. c. 5, fraudulent and void, merely because it is made to defeat the expected execution of a judgment creditor.

In accord with this doctrine are *Holbird v. Anderson*, 5 T. R. 235; *Thomas v. Johnson*, 137 Ind. 244; *Randall v. Shaw*, 28 Kan. 419; *McAllister v. Honea*, 71 Miss.

year 1845; so that for upwards of fifteen years the law on this point, with respect to bills of sale, has been settled. The precise points which has been raised to-day was raised in that case, viz., whether, where a debtor executes a bill of sale, by way of mortgage of his goods, as a security for money lent, if the object be to defeat an execution creditor, the bill of sale is void. *Wood v. Dixie* is an express authority that it is not; in that case Coltman, J., told the jury that, if the intention of the transaction was to defeat the execution creditor, the conveyance was void as against him, and the Court of Queen's Bench held that direction wrong. I am not aware of any case in which the law so laid down has since been disputed. *Rule refused.*¹

FRENCH v. MOTLEY.

SUPREME JUDICIAL COURT OF MAINE, 1874.

[Reported in 63 Maine, 326.]

BILL in equity, brought under R. S., c. 61, by an execution creditor of George H. Motley to compel the payment of the debt out of land conveyed by Seth H. Faunce to Mrs. Motley, upon the ground that the property was purchased by the husband and paid for with his earnings and labor, and that the wife paid no part of the consideration for it. Mr. Motley cleared a piece of land for Mr. Faunce, and to compensate him therefor, these premises were, by his direction, conveyed to his wife, it having been originally agreed that he should take his pay for his services in this land. It was set up in defence that Mrs. Motley had, some years before, lent to Mr. Motley money which she said came to her from the estate of a former husband (Sidney P. Poole), and that it was then agreed that he should invest it in a small homestead for her, and that this one was purchased by him for her, and as her agent, in pursuance of that arrangement; and that the building placed upon the land was bought by Mr. Motley of John J. Perry, and paid for by Motley's labor, under the same arrangement. To substantiate her claim, Mrs. Motley produced a note for \$375, dated at Minot, August

256; *Kuykendall v. McDonald*, 15 Mo. 416; *Waterbury v. Sturtevant*, 18 Wend. 353; *Ziegler v. Handrick*, 106 Pa. 87.

For many other cases illustrating the right of a debtor apart from statute to prefer when insolvent favored creditors, either by absolute payment or by mortgage, see 14 Am. & Eng. Cyc. of Law (2d ed.), 226 *et seq.*

¹ WILDE, B., and CHANNELL, B., delivered brief concurring opinions. In the course of the argument of counsel CHANNELL, B., said: "You contended at the trial that the not taking possession of the goods was a test of fraud. But this bill of sale is by way of mortgage, and, although its object may have been to defeat an execution, that would not, of itself, render the bill of sale void: it is a fact to be taken into consideration, but is not conclusive. The 13 Eliz. c. 5 was intended to apply to voluntary conveyances for the purpose of defeating creditors, not to cases where there is a valid consideration for the conveyance."

26, 1857, payable on demand with interest. Upon its face it purported to be witnessed by Martha Farris, mother of Mrs. Motley, but Mrs. Motley in her deposition, taken in her own behalf, testified that her husband wrote Mrs. Farris' name upon the note. The probate records and a deposition of the administrator of Poole's estate were introduced to show that the widow did not receive from that source six hundred dollars (as alleged in her answer) nor quite \$375, and that part of this was not paid till after 1857. The land conveyed by Faunce to Mrs. Motley was valued by the parties at \$110, which sum was indorsed on the note. The building bought of Perry was worth only about twenty dollars.

Sanderson & Bearce, for the complainant.

John J. Perry, for the respondents.

RESCRIPT. A husband may lawfully pay a *bona fide* debt due from him to his wife, for money of her own lent to him after marriage, by procuring, with her assent, a conveyance to her by a third person of land paid for by him.

When such conveyance is accepted by her in payment of such debt, she holds the land as if bought and paid for by herself with her own money or means, and it is not liable to be taken as the property of the husband, to pay his debts, contracted before such purchase.

In the absence of proof sufficient to establish a common fraudulent intent and design on the part of the husband and wife, his other creditors cannot complain of his preference to discharge his debt to her, rather than to them.

The fact that the debt to the wife has subsisted more than six years prior to such payment, and that the note originally given for it is barred by the statute of limitations, is not conclusive evidence of a want of good faith.

The creditor in this case fails to show to the satisfaction of the court that the wife should not be regarded as the *bona fide* purchaser, for value, of the property conveyed to her.

Mere suspicion, arising out of the relation of husband and wife, will not suffice for that purpose.

*Bill dismissed with costs.*¹

¹ *Brookville Nat. Bank v. Kimble*, 76 Ind. 195; *City Bank v. Wright*, 68 Ia. 132; *Frost v. Steele*, 46 Minn. 1; *Dayton Co. v. Sloan*, 49 Neb. 622; *Manchester v. Tibbitts*, 121 N. Y. 219; *McConnell v. Barber*, 86 Hun, 360; *McAfee v. McAfee*, 28 S. C. 183, *acc.*

In *Martin v. Remington*, 100 Wis. 540, the husband had used his wife's money in purchasing real estate the title to which he took in his own name. By statute in Wisconsin resulting trusts are abolished and the wife had no enforceable claim. Nevertheless a conveyance to her of the land was held to be on good consideration.

FIRST NATIONAL BANK v. GLASS.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT,
JANUARY 27 — MARCH 22, 1897.

[Reported in 49 United States Appeals, 228.]

APPEAL from the Circuit Court of the United States for the First Division of the District of Kansas. Before SANBORN and THAYER, Circuit Judges, and LOCHREN, District Judge.

THIS appeal challenges a decree which sustained a demurrer to a bill brought by a judgment creditor to subject a homestead which the debtor had bought and caused to be conveyed to his wife to the payment of the judgment. The bill disclosed these facts: The statutes of Nebraska exempt from judicial sale a homestead not exceeding in value \$2,000, consisting of a dwelling-house in which the claimant resides and the land on which the house is situated, not exceeding one hundred and sixty acres in extent. Cobbey's Consolidated Statutes, 1891, p. 430, c. 19. The constitution of the State of Kansas exempts from forced sale under process of law a homestead not exceeding one hundred and sixty acres of farming-land, or one acre within the limits of an incorporated town or city, and all the improvements thereon, when it is occupied as a residence by the family of the owner, whatever its value may be. Art. 15, sec. 9, General Statutes of 1889, ¶ 235. From May 4, 1892, until March 22, 1894, the appellee, John F. Glass, owned, and with his wife, Harriet H. Glass, resided upon and occupied one hundred and sixty acres of land in the State of Nebraska as their homestead. In May, 1892, Glass purchased of one Gravatte some fruit trees which were planted on his farm, and which enhanced its value \$3,000. He gave Gravatte a span of horses and six of his promissory notes for these trees. The appellant, the First National Bank of Humboldt, Nebraska, purchased four of these notes before their maturity, and on November 19, 1894, obtained a judgment thereon for \$2,278.44 against John F. Glass in an action which it had commenced in the District Court of Pawnee County in the State of Nebraska on June 24, 1893. Glass was insolvent, and he had no property except the farm which he occupied as his homestead. On March 22, 1894, he sold and conveyed this farm to one Huff for \$6,100, and with that money he bought one hundred and sixty acres of farming-land in Franklin County in the State of Kansas, and caused the vendor to convey it to his wife. He and his wife immediately took possession of it, and have ever since resided upon, occupied, and claimed it as their homestead. The bank caused an execution to be issued on its judgment in 1895, and it was returned *nulla bona*. It then brought an action upon this judgment, and obtained a judgment in that action and a return of execution unsatisfied in the District Court of Franklin County in the State of Kansas. Thereupon it exhibited its bill in the court below, and alleged, in addition to the foregoing facts,

that the appellees sold their farm in Nebraska, secretly fled to the State of Kansas, and purchased and took possession of their farm in that State with the intent and for the purpose of cheating and defrauding the bank out of its claim against Glass and for the purpose of preventing it from collecting its judgment from the farm in Nebraska, which was worth \$4,100 more than the value of an exempt homestead, under the statutes of that State. The bank prayed for the sale of the farm in Kansas and for the application of the proceeds of the sale to the payment of its judgment.

Mr. J. W. Deford submitted a brief for appellant.

Mr. C. A. Smart and *Mr. C. H. Mechem* submitted a brief for appellees.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

An insolvent debtor may use with impunity any of his property that is free from the liens and the vested equitable interests of his creditors to purchase a homestead for himself and his family in his own name. If he takes property that is not exempt from judicial sale and applies it to this purpose, he merely avails himself of a plain provision of the constitution or the statute enacted for the benefit of himself and his family. He takes from his creditors by this action nothing in which they have any vested right. The constitution or statute exempting the homestead from the judgments of creditors is in force when they extend the credit to him, and they do so in the face of the fact that he has this right. Nor can the use of property that is not exempt from execution to procure a homestead be held to be a fraud upon the creditors of an insolvent debtor, because that which the law expressly sanctions and permits cannot be a legal fraud. *Jacoby v. Parkland Distilling Company*, 41 Minn. 227; *Kelly v. Sparks*, 54 Fed. Rep. 70; *Sproul v. The Atchison National Bank*, 22 Kan. 336; *Tucker v. Drake*, 11 Allen (Mass.) 145; *O'Donnell v. Segar*, 25 Mich. 367; *North v. Shearn*, 15 Tex. 174; *Cipperly v. Rhodes*, 53 Ill. 346; *Randall v. Buffington*, 10 Cal. 491.¹ When the appellees sold their farm in Nebraska,

¹ Other decisions holding that an insolvent debtor may transfer property which is not exempt and invest the proceeds in exempt property are, *Reeves v. Peterman*, 109 Ala. 366; *Kelley v. Connell*, 110 Ala. 543; *Flask v. Tindall*, 39 Ark. 571; *Gondy v. Werbe*, 117 Ind. 154, 163; *Meigs v. Dibble*, 73 Mich. 101; *Finn v. Krut*, 13 Tex. Civ. App. 13; *Bell v. Beazley*, 18 Tex. Civ. App. 639; *Bradley v. Gotzian*, 12 Wash. 71. See also *Bates v. Callender*, 3 Dak. 256; *Kapernick v. Louk*, 90 Wis. 232. In *Comstock v. Bechtel*, 63 Wis. 656, the court, though regarding such a transaction as fraudulent, held that the exempt property could not be touched, the creditor's only remedy being to attack the transfer of property which was not exempt. And in *Riddell v. Shirley*, 5 Cal. 488, the court held a creditor entitled to levy on non-exempt property conveyed to free a mortgage on a homestead, the transferee having knowledge of the circumstances. See also *Bishop v. Hubbard*, 23 Cal. 514.

The creditor or trustee in bankruptcy was said to have a right against the homestead or exempt property in *Pratt v. Burr*, 5 Biss. 36; *Re Boothroyd*, 14 B. R. 223; *Re Parker*, 18 B. R. 43; *Brackett v. Watkins*, 21 Wend. 68. See also *Re Wright*, 8 B. R. 430; *Re Santhoff*, 16 B. R. 181; *Re Melvin*, 17 B. R. 543; *Re Boston*, 98 Fed. Rep. 587.

and bought and took possession of their homestead in Kansas, the bank had acquired no lien and no specific equitable interest in any of the property of its debtor. It was his simple contract creditor, and it had no vested right in either his property or his residence. He had the right to change his residence from one State to another, and to secure for himself a homestead in any State where he chose to live. If, therefore, he had taken the conveyance of his homestead in Kansas in his own name it would have been exempt from the judgment of the appellant. D

The only question remaining is whether the farm lost this exemption because he caused it to be conveyed to his wife. Upon this question the authorities are not in accord. The Supreme Court of Minnesota declares that such a transaction is a fraud upon creditors and subjects the property so acquired to the payment of their debts. *Summer v. Sawtelle*, 8 Minn. 309; *Rogers v. McCauley*, 22 Minn. 384. The Supreme Court of Kansas, on the other hand, holds that a homestead purchased and paid for from the unexempt property of the husband is equally exempt from judicial sale, under the constitution of that State, whether the title is taken in the name of the husband or in that of the wife. *Monroe v. May*, 9 Kan. 466, 475, 476; *Hixon v. George*, 18 Kan. 253, 258. The decisions of the highest judicial tribunal of the State of Kansas, which we have cited, settle this question in the case at bar. The question involves the construction and effect of the constitution and statutes of that State, and the decisions of it by that court establish a rule of property there, which has prevailed without modification for a quarter of a century. As was said by Mr. Justice FIELD in *Christy v. Pridgeon*, 4 Wall. 196, at page 203, in speaking of a law of the Republic of Mexico, which had subsequently become, in effect, a local law of the State of Texas: "The interpretation, therefore, placed upon it by the highest court of that State, must, according to the established principles of this court, be accepted as the true interpretation, so far as it applies to titles to lands in that State, whatever may be our opinion of its original soundness. Nor does it matter that in the courts of other States, carved out of territory since acquired from Mexico, a different interpretation may have been adopted. If such be the case, the courts of the United States will, in conformity with the same principles, follow the different ruling so far as it affects titles in those States." The construction, by the highest judicial tribunal of a State, of its constitution or statutes, which establishes a rule of property, is controlling authority in the courts of the United States when no question of right under the Constitution and laws of the Nation, and no question of general or commercial law, is involved. *Brashear v. West*, 7 Pet. 608, 615; *Allen v. Massey*, 17 Wall. 351; *Lloyd v. Fulton*, 91 U. S. 479, 485; *Sumner v. Hicks*, 2 Black, 532, 534; *Jaffray v. McGehee*, 107 U. S. 361, 365; *Peters v. Bain*, 133 U. S. 670, 686; *Randolph's Executor v. Quidnick Company*, 135 U. S. 457; *White v. Cotzhausen*, 129 U. S. 329; *Union Bank of Chicago v. Kan-* 3
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sas City Bank, 136 U. S. 223, 235; *Detroit v. Osborne*, 135 U. S. 492; *Madden v. County of Lancaster*, 27 U. S. App. 528, 535 to 537; *Ottenberg v. Corner*, 40 U. S. App. 320, 329.

The decree below is in accordance with the constitution and statutes of the State of Kansas, as they have been construed by its Supreme Court, the property in controversy is situated in that State, and its title is fixed by that construction. Let the decree be

Affirmed, with costs.

BENSON v. BENSON.

MARYLAND COURT OF APPEALS, JANUARY TERM, 1889.

[Reported in 70 *Maryland*, 253.]

STONE, J.¹ Joseph M. Brian became security on the guardian bond of Thales A. Linthicum, who was the guardian of the complainant Elizabeth H. Benson about the year 1868. The said Joseph M. Brian died in 1878, and the guardian Linthicum in 1880. The same year in which he died Bryan conveyed all his property to his two children, a son and a daughter. Linthicum, the guardian, died insolvent, and before any final settlement of his guardian accounts; and after his death it was discovered that he was largely indebted to his ward. It also turned out that the other two securities on the guardian bond were totally insolvent, and Mrs. Benson then filed the bill in this case to set aside the deeds made by Bryan to his children as fraudulent and void against her; and whether these deeds are fraudulent and void as against her is the first and most important point in the case.

These deeds were executed by Brian a short time — a few months — before his death. The consideration set forth in the deed to his daughter professed to be love and affection; the consideration set forth in the deed to his son was the sum of seventeen thousand dollars. But the son proves that he did not pay his father a dollar in money, but claims to have paid subsequently debts due by his father to about that amount.

The deed executed by Brian to his daughter was for real estate only, and was executed on 3d September, 1878. The deed to his son was executed on the following day, and embraced all the property, both real and personal, of the said Joseph M. Brian, except what he had before given to his daughter.

There is no evidence in the record of the value of the property given to his daughter, but there is evidence of the value of the real estate given to his son, and it seems to have been worth about forty thousand dollars, or perhaps a little more. There was a considerable amount of

¹ A portion of the opinion in regard to the amount for which the guardian's bond could be enforced is omitted.

personal property which passed to the son under the deed to him, which, if we understood his evidence correctly, was intended as compensation to the son for services rendered the father.

Simultaneous with the execution of these deeds the father, Joseph M. Brian, Sen., entered into a written agreement with his children, by which each agreed to pay him, if he demanded it, five hundred dollars a year. If he demanded any money from one he promised to demand an equal amount from the other, so that he might not be a greater burden on one than the other, and all arrears of his annuity were to be considered as paid and settled at the time of his death, so that his personal representative (if any) could make no claim for such arrears. The recital of these facts shows conclusively the character of this whole transaction.

A man advanced in life and of considerable wealth, about two months before his death, conveys all his property to his children. His son is to pay his debts, and his share was probably for that reason greater by the amount of such debts, than his daughter's. The deed to his daughter was confessedly a purely voluntary conveyance, and the deed to the son, upon the proof, is also a voluntary conveyance. The son did not pay a dollar for the property. All he professes to have done was to pay some debts of the father, not amounting at most to half the value of the real estate alone that he got. It needs no authority for so plain a proposition, that the son was not under these circumstances a purchaser for a valuable consideration and to be treated as such.

The deeds, the agreement, and the proof show that Mr. Brian's object was to divide his property between his children in his lifetime, retaining only an annuity sufficient for his wants for his life.

There is nothing in this record to show that Mr. Brian contemplated any fraud whatever. He may not, and probably did not, apprehend any loss on account of his being on this guardian bond. But whether he did or did not, these deeds cannot avail against the claim of these complainants, and must be declared, as against them, fraudulent and void. To hold otherwise would be to declare that an obligor on a bond might always relieve himself, when loss was apprehended by giving his property to his wife or child.¹

¹ The relationship of parties to a transaction claimed to be a fraudulent conveyance, is often important evidence with other circumstances, but, though in some cases rules of legal presumption are stated, the better view seems to be that the fact of relationship in any case is in itself of no legal importance, but has such weight as a fact in any case as the court or jury think it entitled to. Numerous cases bearing on the point are collected in 24 Century Digest, 444 *et seq.*

JAEGER v. KELLEY.

NEW YORK COURT OF APPEALS, FEBRUARY 17-25, 1873.

[Reported in 52 New York, 274.]

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, modifying and affirming as modified a judgment in favor of plaintiff entered upon a verdict.

This action was brought to recover the value of 1,364 gallons of wine alleged to have been unlawfully taken and converted by defendant.

Plaintiff purchased the wine of one Theodore Lingenfender at ninety-two and a half cents per gallon. He paid a debt of Lingenfender of \$250, paid the duties at the custom-house and bonded warehouse, and the balance he paid in money. The wine was levied upon by defendant, as sheriff of the city and county of New York, under and by virtue of an execution against said Lingenfender and another.

Further facts appear in the opinion.

The court on trial directed the jury to find for plaintiff, submitting to them simply the value of the property; to which defendant duly expected.

Defendant's council requested the court to submit to the jury the question of fraud. The court refused so to do and defendant excepted. The jury found for plaintiff as directed. A motion was made by defendant for a new trial upon the judge's minutes, which was denied.

J. S. Smith, for the appellant.

Ira D. Warren, for the respondent.

CHURCH, C. J. The only question in the case is whether the trial judge erred in refusing to submit to the jury the question whether the sale of the wine to the plaintiff was fraudulent as against creditors.

With the exception of the fact that the plaintiff purchased the wine at a little less than one-half its actual value, as found by the jury, there is no substantial evidence tending to impeach his title, and it is well settled that mere inadequacy of price is not sufficient. The plaintiff

¹ *Clark v. Krause*, 2 Mack. (D. C.) 559; *Klemm v. Bishop*, 56 Ill. App. 613; *Mathews v. Reinhardt*, 149 Ill. 635; *Cagney v. Cuson*, 77 Ind. 494 (*conf.* *Hubbs v. Bancroft*, 4 Ind. 388); *Talbot v. Hooser*, 12 Bush. 408; *Montgomery v. Wilson*, 31 La. Ann. 53; *Foster v. Pugh*, 20 Miss. 416; *Briant v. Jackson*, 99 Mo. 585; *Knoop v. Kelsey*, 121 Mo. 642; *Goddard v. Weil*, 165 Pa. 419; *McPherson v. McPherson*, 21 S. C. 261; *Moore v. Lowery*, 27 Tex. 541; *Agricultural Assoc. v. Brewster*, 51 Tex. 257; *Bierne v. Ray*, 37 W. Va. 570; *Wood v. Harmison*, 41 W. Va. 376, *acc.* In most of these cases, however, there is stated some such qualifications as "unless the inadequacy is gross," or "unless the price is so manifestly inadequate as to shock the moral sense."

On the other hand it is laid down by some courts that if a conveyance is made by one who is in debt, inadequacy of consideration is evidence, though not conclusive, of fraud. *Borland v. Mayo*, 8 Ala. 104; *Beebe v. De Baun*, 8 Ark. 510; *Galbreath v. Cook*, 30 Ark. 417; *Washband v. Washband*, 27 Conn. 424; *Gainer v. Russ*, 20 Fla. 157; *Dodson v. Cooper*, 50 Kan. 680. See also *Hudgins v. Kemp*, 20 How. 45; *Hull v. Deering*, 80 Md. 424; *Fisher v. Shelver*, 53 Wis. 498. In *Scoggin v. Schloath*, 15 Ore. 380, it was held that a conveyance of land worth \$2,000 for the consideration of \$100 was constructively fraudulent.

was engaged in the business; he paid in cash the agreed price and took immediate possession of the property. There is no evidence that he had any knowledge of the pecuniary circumstances of Lingenfelder, or that the latter owed any other than the debt which the plaintiff paid as a part consideration for the wine. Nor is the vendor's fraudulent intent sufficient. The vendee must be also implicated, and I can find no fact proved in the case, aside from inadequacy of price, which tends to impeach his good faith. It is urged that he prevaricated in his testimony. This cannot be affirmed as to the substantial facts, the purchase, payment of the consideration and taking possession; and the discrepancies as to minor details are not important. It is said that Eistel, the broker, who negotiated the sale, was a suspicious character, because the evidence tends to show that his real name was Isaacs; but what influence this should have upon the purchase I am unable to see. It is also said that Eistel acted in the transaction both for vendor and vendee, and that each is chargeable with his knowledge. If this were so, there is not the slightest evidence that Eistel knew any facts which would impeach the sale; but the evidence is that the plaintiff made the bargain for himself. Eistel solicited the plaintiff to buy, and if he was an agent at all, it was for the vendor; and the assistance he rendered the plaintiff in procuring a cellar in which to store the wine does not change it. To invalidate a sale, tangible facts must be proved, from which a legitimate inference of a fraudulent intent can be drawn. It is not enough to create a suspicion of wrong, nor should a jury be permitted to guess at the truth. If the transaction was different from what the plaintiff proved, it was incumbent on defendant to show it. Giving every circumstance urged by defendant's counsel its utmost significance, the most that can be said is, that there was a slight evidence justifying a suspicion that the plaintiff was not a *bona fide* purchaser, but this would not justify this court in reversing the judgment. The value of the wine may have been exaggerated at the trial, but the defendant offered no evidence upon the subject, and he must, therefore, take the consequences of the plaintiff's estimate. He may have supposed that if the value was reduced, the force of the circumstance of the inadequacy of price would be lessened, and, with that out of the case, he would have no foothold. The wine was sold by the sheriff at public auction at a less price than the plaintiff paid, and there is more reason to doubt whether the price paid was in fact inadequate than that it was purchased in bad faith; but the jury have settled the question, and the defendant cannot now complain.

The deduction made at the General Term was for the benefit of the defendant, and was based upon the idea that the jury had made a mistake in estimating the whole value at two dollars a gallon, the price proved. The cases cited are not analogous.

The judgment must be affirmed.

ALLEN, GROVER and FOLGER, JJ., concur.

PECKHAM, ANDREWS and RAPALLO, J.J., dissent.

Judgment affirmed.

BALDWIN v. SHORT.

NEW YORK COURT OF APPEALS, JANUARY 27-FEBRUARY 24, 1891.

[Reported in 125 New York, 553.]

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made December 7, 1889, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought by plaintiff, as assignee for the benefit of creditors of the firm of Dow, Short & Co., to set aside a deed executed by the defendant Orinda B. Sperry, a member of said firm, to the defendant Fannie M. Short, as fraudulent and void as against creditors.

Louis Marshall, for appellants.

Martin A. Knapp and *Charles G. Baldwin*, for respondent.

FINCH, J. The findings of fact in this case establish that the conveyance of the house and lot to Mrs. Short by Mrs. Sperry was made and accepted with an intent on the part of both grantee and grantor to hinder, delay, and defraud the creditors of the latter. The conveyance was not voluntary, for it was made in part in consideration of a debt of about \$8,000, which the findings show was an honest debt, and justly due to the grantee from the grantor. The conclusion of a fraudulent intent on the part of Mrs. Short was, therefore, essential to a recovery, and was established by proof that the balance of the consideration for the transfer was made up of a false and pretended debt for board and washing, which was wholly fictitious and never in fact existed, and which both parties to the transaction falsely concocted to make up a full and fair consideration for the conveyance. The existence or the falsity of that indebtedness was, therefore, an essential and vital element in the controversy, and the appellants claim that, in the effort to show it to have been a fabrication, evidence was admitted against Mrs. Short of declarations made by Mrs. Sperry at a period preceding the conveyance, which bore directly upon the validity of the disputed debt, and were inadmissible as against Mrs. Short.

Mrs. Parker, a witness for the plaintiff, was permitted to testify that just prior to the assignment she had a conversation with Mrs. Sperry in the absence of Mrs. Short, in the course of which Mrs. Sperry said: "I think I shall sell this house; it costs so much to keep it up just for Mary's and my board." The defendants had asserted that such board was an honest debt due to Mrs. Short from her mother, and the plaintiff, that it was paid and extinguished as it accrued by the rent of the house, and that by agreement the board was to be furnished in exchange for the rent which would otherwise have been due from Mrs. Short on account of her occupation. The declaration sworn to by Mrs. Parker tended to show the truth of plaintiff's contention, but was made in the absence of Mrs. Short, constituted no part of the *res gestæ*, and

was inadmissible as against the grantee, in whose behalf the objection was made. But it is a conclusive answer to this allegation of error that Mrs. Short herself, when examined as a witness, admitted all and more than what the objectionable evidence tended to prove. She acknowledged that during her occupation of the house her mother paid all the taxes and insurance, and almost all the charges for repairs, and further testified: "I don't remember saying to Mrs. Sherwood that I boarded my mother and Mary for the rent of the house, did their washing: that while I thought a great deal of my sister, I thought it was hard I should pay the rent and that my sister should receive it: I would not say I didn't: I don't remember: I don't know when I said it: that was the arrangement under which I was in the house." She said again, at a later period of her examination: "I had loaned my mother this money: I boarded her and my sister, and did their washing for this house; for the rent of the house; . . . I was not to pay any rent only in that way; only to board them in that way and do their washing, that was to pay my rent, and that arrangement continued down to the time I received my deed." Of course, these admissions made the declarations to Mrs. Parker wholly superfluous and immaterial.

Mrs. Parker was also permitted to narrate other declarations of Mrs. Sperry made prior to the conveyance under objection. These were, in substance, that it was preposterous to suggest that she should make presents to her daughters because they took care of her when she was sick; that they only did their duty. In answer to the objection interposed in behalf of Mrs. Short the court held the declarations not competent, but, to accommodate the witness, allowed them to be detailed, conditioned upon their being stricken out if not made competent. In the further progress of the trial both Mrs. Short and Mrs. Sperry testified to the transfer to the former by the latter of some "ranch stock" a few months before the assignment, and added that it was done as remuneration for the services rendered during Mrs. Sperry's sickness. The declarations sworn to by the witness tended to show that the mother did not regard the services of her daughters during her illness as constituting a debt which she was in any manner bound to repay, and that is the sole element of value in the proof. But exactly that Mrs. Short herself finally admitted. She said expressly that for her services in the illness referred to she neither asked nor expected any pay; that the transfer of the ranch stock was a present; that it was given to her, and so constituted a gift rather than a purchase. If it be still suggested that the declaration proved showed an existing unwillingness to make her a present, the fact was both immaterial and harmless, for the admitted delay of at least eight years shows the same thing much more forcibly and leaves no doubt about the suggested lack of inclination.

But another class of evidence was received under objection. The plaintiff proved several instances of transfers of property by Mrs. Sperry to persons other than Mrs. Short prior to the conveyance to the latter, and it was objected, in her behalf, that she could not be affected

by transactions to which she was not a party and of which she had no knowledge. But the plaintiff was bound to prove the fraudulent intent of Mrs. Sperry, both as against herself and as against Mrs. Short, and as against the latter by evidence competent as against her. The acts and transfers of Mrs. Sperry pertinent to the question of her intent were admissible against both to establish that intent, and are not to be excluded because they do not also bear upon the intent of Mrs. Short. It is not necessary that the same fact offered in evidence should tend to establish both intents. If it proved Mrs. Sperry's alone, but was a kind of evidence competent against Mrs. Short, no error would follow its admission. It would tend to prove one branch of the issue, leaving the other to be met in some different way.

There are some other objections to evidence, but of so little importance as not to justify discussion. They related principally to the declarations of Mrs. Sperry on the day of the assignment and conveyance and pending the preparation of those instruments, and were either within the *res gestæ*, or wholly immaterial in view of the ultimate course of the trial.

The contention that the conveyance to Mrs. Short may be sustained to the extent of the adequate and honest part of the consideration, is fully answered by authorities which hold that where the deed is fraudulent against creditors, it is wholly void and cannot stand to any extent as security or indemnity. *Boyd v. Dunlap*, 1 Johns. Ch. 478; *Dewey v. Moyer*, 72 N. Y. 70; *Billings v. Russell*, 101 N. Y. 228. A different rule would put a premium upon fraud.¹ Almost invariably some honest

¹ *Bean v. Smith*, 2 Mason, 252; *Borland v. Walker*, 7 Ala. 269; *Millington v. Hill*, 47 Ark. 301; *Beidler v. Crane*, 135 Ill. 92; *Head v. Harding*, 166 Ill. 353; *Seivers v. Dickover*, 101 Ind. 495; *Burch v. Hart*, 138 Ind. 1; *Chapman v. Ransom*, 44 Ia. 377; *Liddle v. Allen*, 90 Ia. 738; *Holland v. Cruft*, 20 Pick. 321; *Thompson v. Bickford*, 19 Minn. 17, 23; *Byrnes v. Volz*, 53 Minn. 110; *McLean v. Letchford*, 60 Miss. 169; *Allen v. Berry*, 50 Mo. 90; *Sands v. Codwise*, 4 Johns. 536; *Conde v. Hall*, 92 Hun. 335; *Alley v. Connell*, 3 Head, 582; *Shepherd v. Woodfolk*, 10 Lea, 593, 598; *Henderson v. Hulton*, 26 Gratt. 926, 933; *Webb v. Ingham*, 29 W. Va. 389; *Ferguson v. Hillman*, 55 Wis. 181; *Bank of Commerce v. Fowler*, 93 Wis. 241, *acc.* See also *Clements v. Moore*, 6 Wall. 299.

In Louisiana, a fraudulent grantee is entitled to restitution of the consideration paid by him if he proves that it inured to the benefit of the creditors. *Chaffe v. Gill*, 43 La. Ann. 1004. See also *Barrow v. Bailey*, 5 Fla. 9; *How v. Camp*, Walk. Ch. (Mich.) 427.

If the conveyance is only constructively fraudulent, or if the grantee has not been a participant in any actual fraud, he is entitled in equity, at least, to reimbursement. *Bean v. Smith*, 2 Mason, 252; *Gordon v. Tweedy*, 71 Ala. 202; *Lobstein v. Lehn*, 120 Ill. 555; *Wood v. Goff's Curator*, 7 Bush, 63; *Gardner Bank v. Wheaton*, 8 Greenl. 373; *Hinkle v. Wilson*, 53 Md. 287; *Cone v. Cross*, 72 Md. 102; *Lynde v. McGregor*, 13 Allen, 182; *Thomas v. Beals*, 154 Mass. 51; *Thompson v. Bickford*, 19 Minn. 17; *Borden v. Doughty*, 42 N. J. Eq. 314; *Colgan v. Jones*, 44 N. J. Eq. 274; *Boyd v. Dunlap*, 1 Johns. Ch. 478; *Brown v. Chubb*, 135 N. Y. 174; *Oliver v. Moore*, 26 Ohio St. 298; *McMeekin v. Edmonds*, 1 Hill's Ch. (S. C.) 288; *Foster v. Foster*, 56 Vt. 540; *Henderson v. Hulton*, 26 Gratt. 926; *First Nat. Bank v. Bertschy*, 52 Wis. 439. See also *Taylor v. Atwood*, 47 Conn. 498, 507; *Skiles's Appeal*, 110 Pa. 248.

In *Loos v. Wilkinson*, 113 N. Y. 485, and *How v. Camp*, Walk. Ch. (Mich.) 427, it

consideration is made the agency for floating a scheme of fraud against creditors, and if that may always be saved, nothing is lost by the effort and the temptation to venture it is increased. We are thus unable to find in the record any error which will justify a reversal. Indeed, since the ground of recovery against the defendants rests almost wholly upon the single fact of a false and fraudulent consideration, fabricated by the joint act of both grantor and grantee, and distinctly admitted by each to have been without an honest foundation, the questions of evidence raised can hardly be said to have affected the ultimate result.

The judgment should be affirmed with costs.

All concur, except RUGER, Ch. J., and ANDREWS, J., not voting.

Judgment affirmed.

CROCKETT v. PHINNEY.

MINNESOTA SUPREME COURT, FEBRUARY 4, 1885.

[Reported in 33 Minnesota, 157.]

BERRY, J. This is an action in the nature of trespass or trover, for taking and converting certain lumber, of which plaintiffs claim to be owners by virtue of a sale and delivery thereof to them by its former owner, the firm of J. D. Campbell & Co. The defendants except Phinney, who, as sheriff, acted for his co-defendants, are creditors of J. D. Campbell & Co., and, as such, attached the lumber, upon the basis that, as to them, the sale to plaintiffs was fraudulent. There was competent evidence in the case sufficient to warrant the jury in finding that there was no fraud on the part of the plaintiffs in making the purchase, and that they paid \$1,000 of the purchase price of the lumber in good faith, and before notice of any fraudulent intent in making the sale on the part of the firm of Campbell & Co. towards its creditors. For the remainder of the purchase price plaintiffs executed their negotiable promissory note to Campbell & Co., payable in six months, and the evidence tends to show that this note was, by agreement between plaintiffs and Campbell & Co., left in the hands of a third person (Ball), by whom the money amount of any shortage in the estimated quantity of the lumber, when ascertained, was to be indorsed on the note, which was then to be handed over to Campbell &

was held that a grantee, though actually fraudulent, was entitled to be credited with money paid for taxes and necessary repairs. See also *Jackson v. Ludeling*, 99 U. S. 513. *Contra* is *Strike's Case*, 1 Bland Ch. (Md.) 57; s. c. on appeal *sub nom.* *Strike v. McDonald*, 2 Har. & G. 191.

When property subject to an encumbrance is transferred to a fraudulent grantee, the creditors can recover only the value of the property, encumbered as it was, though the encumbrance has been removed. *Ladd v. Wiggin*, 35 N. H. 421; *Hamilton Nat. Bank v. Halsted*, 134 N. Y. 520. See also *Lejve v. Stoppel*, 64 Minn. 74.

Co. The evidence further tended to show that at the time of the attachments, and of notice to plaintiffs of the alleged fraudulent intent of Campbell & Co. in making the sale, the note was still in Ball's hands, under the agreement mentioned, and that subsequently the indorsement of shortage was made thereon, and the note delivered to Campbell & Co., by whom it was put into Ball's hands as security for some indebtedness of Campbell & Co. to him, and to a firm of which he was a member, and in this way Ball held the note at the time of the trial of this action.

In this state of facts the defendants contend that the plaintiffs' recovery should at least be limited to the amount which they had paid upon their purchase of the lumber, at the time when they had notice of the fraudulent intent of Campbell & Co. in making the sale.

In certain circumstances, equity affords relief analogous to that which defendants thus seek in this instance; as, for example, in contests as to title to real estate between a subsequent purchaser and persons having prior equitable rights, such as a prior purchaser whose deed or contract is unrecorded, of whose right the subsequent purchaser had no notice at the time of his purchase; also, in like contests between an honest purchaser and creditors of his vendor, who claim that the sale was fraudulent as to them, and who seek to avail themselves of their equitable lien, as creditors, upon their debtor's property. In instances like these, where the whole purchase-money has not been paid, in fact, or by the giving by the purchaser of an irrevocable obligation for its payment, equity will sometimes, as respects the prior purchaser or creditor, as the case may be, treat the sale as fraudulent and void by setting it aside, or otherwise, but at the same time will place the honest purchaser *in statu quo*, by restoring to him whatever he has paid upon his purchase, and otherwise reinstating him in his position before his purchase. *Clements v. Moore*, 6 Wall. 299; *Lewis v. Phillips*, 17 Ind. 108; *Hardin v. Harrington*, 11 Bush, 367; *Tompkins v. Sprout*, 55 Cal. 31; 2 Pom. Eq. Jur. §§ 745-751; *Wait, Fraud. Conv.* §§ 192, 193.

But, so far as we discover, this relief is afforded in equitable proceedings only, and only in regard to real estate.¹ But we think the

¹ The doctrine is applicable to personal property. In some form of procedure a party entitled under a constructive trust to personal property may enforce the trust against a purchaser who has paid part of the price only before notice, either treating the purchaser as if a mortgagee for the price paid before notice, or, less commonly, holding him liable for the balance of the price. *Simmons v. Shelton*, 112 Ala. 284, 291; *Bush v. Collins*, 35 Kan. 535; *De Ford v. Orvis*, 42 Kan. 302; *Work v. Coverdale*, 47 Kan. 307; *Riddell v. Munro*, 49 Minn. 532; *Dougherty v. Cooper*, 77 Mo. 528; *Sargent v. Eureka Co.*, 46 Hun, 19. The question is left open in *Florence Co. v. Ziegler*, 58 Ala. 221, 225.

In *Riddell v. Munro*, 49 Minn. 532, the plaintiff had purchased a piano, the price being payable in instalments, from Louis Northcott, who had obtained title by a fraudulent sale from an embarrassed debtor, whose creditors had now levied on the property. The plaintiff brought action against the sheriff. The court say: "Plaintiff had paid but two instalments of five dollars each on the piano, and the question was

trial court properly held that in this action, whatever might be done in an equitable proceeding, the defendants could not avail themselves of the equitable doctrine spoken of; for this is an action purely in the nature of the common-law action of trespass or trover. The issues are such, and such only, as pertain to actions of those kinds. The vital issue — the precise matter in dispute upon the allegations of the pleadings — is whether or not the sale by Campbell & Co. to the plaintiffs was wholly fraudulent and void as respected the defendants, as creditors of Campbell & Co., from the fact that it was made with the intent and purpose of defrauding such creditors, to the plaintiffs' knowledge. What, if any, equitable relief the defendants might be entitled to in case the sale was not thus fraudulent and void was altogether outside of the issues.

If the plaintiffs had purchased the property in good faith, and without any knowledge or participation in any fraudulent intent of the vendor, and had paid for it in whole or in part, they had become legal owners of it even as against the vendor's creditors; and in this action their ownership would entitle them to recover the value of the lumber seized by defendants. It may be possible that by setting up their equities in this action, or some other, and bringing in Ball and Campbell & Co., so as to protect plaintiffs against their outstanding negotiable note (*Nicols v. Crittenden*, 55 Ga. 497), and restore them to their *status in quo*, the defendants might obtain some such relief as they seek, although the lumber was personal property. But if any such equities could be asserted in such an action as this, they must be set up in the answer. Gen. St. 1878, c. 66, § 96. But, as this action stood at the trial, it was a simple action at law, and its issues purely legal, as before stated. Wait, Fraud. Conv. § 194.

These are the only matters which we deem it necessary to discuss in this opinion, and the result is that the order denying a new trial is affirmed.

also raised whether his recovery should not be limited, in any event, to the amount advanced by him before notice of the fraud. As against judgment creditors, his recovery would be so limited, provided he was not answerable over to Louis Northcott for the balance on the contract with him; but this could not be determined, as against the latter, unless he was a party or was bound to take the burden of the litigation for breach of warranty of title. As this does not appear, we cannot hold the ruling of the court [allowing the value of the piano] wrong on the question of the damages."

On the general question how far one who has innocently acquired title and paid part of the price is protected, see *Ames Cas. Trusts*, 288 *note*, *Ames Cas. Bills and Notes*, I 670, 676 and *notes*.

IN RE JOHNSON. GOLDEN v. GILLAM.

IN THE CHANCERY DIVISION, DECEMBER 13-15, 1881.

[Reported in 20 Chancery Division, 389.]

THIS was an action to set aside a deed of gift as fraudulent and void under the statute 13 Eliz. c. 5.

The deed of gift was dated the 12th of June, 1878, and witnessed that in consideration of the natural love and affection of Judith Johnson, widow, towards her daughters Alice and Amy, and of the covenants thereafter contained, the said Judith Johnson granted a farmhouse and premises in Trunch, in the county of Norfolk, to Stephen Gillam and his heirs, as to one moiety to the use of her daughter Alice, and as to the other moiety to the use of her daughter Amy, and assigned the crops of the farm as to one moiety in trust for Alice, and as to the other moiety in trust for Amy. And Alice and Amy covenanted that they, or one of them, would "pay all the just debts incurred by the said Judith Johnson up to the date of the said indenture in connection with the working and management of the said farm," and would maintain the said Judith Johnson during her life, providing her with a home, food, clothes, and medical or other attendance in such style or manner as she had been theretofore accustomed to.

This deed of gift, which was executed by Judith Johnson and Alice Johnson, was a conveyance of all the property of Judith Johnson.

The plaintiff was a creditor of Mrs. Johnson at the date of the deed for £120. This debt was not incurred by Mrs. Johnson, but by William Johnson, her predecessor in the farm, and she had adopted it by giving a promissory note for the amount.

Evidence was offered that there were other creditors of Mrs. Johnson besides the plaintiff, who were not provided for by the deed, but the court held that none of these debts were proved to have been incurred for purposes unconnected with the farm.

The state of the family of Judith Johnson when the deed was executed was as follows: Judith Johnson was the widow of William Johnson, who had previously been the husband of her sister, and had had by her a family of whom one son, James, was living. After his first wife's death William Johnson had gone through the ceremony of marriage with Judith Johnson, his deceased wife's sister, and had a family by her, of whom George, Arthur, Alice, and Amy were living. William Johnson had provided for his children, other than Alice and Amy, out of other property, and shortly before he died he granted the Trunch farm—the subject of this litigation—by deed of gift to Judith Johnson, in consideration of her covenant "to pay all debts incurred by William Johnson in connection with the working and management of the farm, and all liabilities that he might incur for means of living, medical attendance, and expenses of a like nature."

George and James Johnson were living away from the farm, Arthur lived with his mother, Mrs. Johnson, till 1877, when he left, and, Mrs. Johnson being then bedridden, the farm was carried on by Alice, the elder daughter, and Amy (who was an infant at the date of the deed), with the assistance of the defendant Gillam. Gillam made them advances of money from time to time for the purchase of cattle and stock, and repaid himself out of the produce. The plaintiff claimed to set aside the deed to the defendant as fraudulent against himself and the other creditors of Mrs. Johnson.

J. Pearson, Q. C., and Maidlow, for the plaintiff.

W. W. Karlake, Q. C., and Hadley, for the defendant.

Fry, J., after stating the effect of the deed, said :

It is clear that the consideration for the deed of the 12th of June, 1878, was in part meritorious and in part valuable. The question before me is whether the deed is void against creditors under the statute of the 13 Eliz. c. 5.

For the purpose of deciding this, it will be convenient and proper to refer to the material words of the statute, and I find these sufficiently stated in a passage of the judgment of Sir Thomas Plumer, when Vice-Chancellor, in *Copis v. Middleton*, 2 Madd. 410. He says (2 Madd. 427) : "The preamble of the act is, for the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, as well of lands and tenements as of goods and chattels, devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, debts, etc., not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing . . . between man and man, without which no commonwealth or civil society can be maintained or continued. A conveyance, therefore (the Vice-Chancellor continues), to be affected by this act, must be shown to be feigned, covinous, and fraudulent, and made with an intent to delay, hinder, or defraud creditors : but if this case were held to be within the statute, it would be the overthrow of all true and plain dealing and bargaining between man and man ; for, as a purchaser cannot know the circumstances of the vendor, it would prevent all dealing and bargaining between man and man, and counteract the object of the statute. The statute, in order to prevent this inconvenience, has by the 6th section provided that the act shall not extend to any conveyance upon good consideration and *bona fide* to any person not having at the time of such conveyance any manner of notice or knowledge of such covin, fraud, or collusion. A conveyance, therefore, cannot be invalidated by this act if there has been a *bona fide* purchaser."

In *Thompson v. Webster*, 4 Drew. 628, Vice-Chancellor Kindersley said (p. 632) with regard to the general principle of the act : "The principle now established is this : The language of the act being that any conveyance of property is void against creditors if it is made with intent to defeat, hinder, or delay creditors, the court is to decide in

each particular case whether on all the circumstances it can come to the conclusion that the intention of the settlor in making the settlement was to defeat, hinder, or delay his creditors."

It is obvious that the intent of the statute is not to provide equal distribution of the estates of debtors among their creditors, — there are other statutes which have that object; nor is it the intent of this statute to prevent any honest dealing between one man and another, although the result of such dealing may be to delay creditors. And cases have been cited accordingly where deeds of this nature have been held good, though the result of them has been that creditors have been not only delayed but excluded.

The effect on a deed of this sort of its being for good consideration is very great. It does not necessarily show that the deed may not be void under the statute, because in many cases good consideration has been proved, and yet the object of the deed has been to defeat and delay creditors; such has been, therefore, for an unconscientious purpose, and the fact that there has been good consideration will not uphold the deed. But nevertheless it is a material ingredient in considering the case, and for very obvious reasons: the fact that there is valuable consideration shows at once that there may be purposes in the transaction other than the defeating or delaying of creditors, and renders the case, therefore, of those who contest the deed more difficult. In the case of *Harman v. Richards*, the Lord Justice Turner, then Vice-Chancellor, makes this observation, 10 Hare, 89: "It remains to be considered whether the settlement which was thus made for valuable consideration was also made *bona fide*, for a deed, though made for valuable consideration, may be affected by *mala fides*. But those who undertake to impeach for *mala fides* a deed which has been executed for valuable consideration, have, I think, a task of great difficulty to discharge."

Lord Hatherley, when Vice-Chancellor, adopted the same view in the case of *Holmes v. Penney*, 3 K. & J. 90, which has been discussed before me, and the same point was stated with even more force by Lord Justice Giffard in *Freeman v. Pope*, Law Rep. 5 Ch. 538. He said in that case (p. 544): "I do not think that the Vice-Chancellor need have felt any difficulty about the case of *Spirett v. Willows*, 8 D. J. & S. 293, but he seems to have considered that in order to defeat a voluntary settlement there must be proof of an actual and express intent to defeat creditors. That, however, is not so. There is one class of cases, no doubt, in which an actual and express intent is necessary to be proved, that is in such cases as *Holmes v. Penney*, 3 K. & J. 90, and *Lloyd v. Attwood*, 3 De G. & J. 614, where the instruments sought to be set aside were founded on valuable consideration; but where a settlement is voluntary, then the intent may be inferred in a variety of ways." I therefore proceed to inquire, looking to all the circumstances of the case and at the nature of the instrument itself, whether I can or ought to infer an intent to defraud creditors in the parties to the deed. I say in the parties to the deed, because it appears to me to be plain that

whatever fraudulent intent there may have been in the mind of Judith Johnson, it would not avoid the deed unless it was shown to have been concurred in by Alice, who became the purchaser under the deed. It has not been contended, and it could not be contended, that the mere fraudulent intent of the vendor could avoid the deed, if the purchaser were free from that fraud.

[His Lordship then adverted to the provision which had been made before the date of the deed for the other children of Judith Johnson, and continued:]

Having regard to the condition of the family, the deed was a highly proper one; the sons had left the home, and were provided for by the dispositions which their father had made of the residue of his property; Mrs. Johnson was possessed of this farm and of nothing else; the two single daughters living with her must have been objects of her anxiety and care; she was bedridden and not likely to recover; the farm was practically carried on by Alice. Thereupon this deed was executed with the obvious intention of making over to the daughters that farm which their mother hoped they would reside on after her decease, to avoid the heavy succession duty which would ensue if she allowed the farm to pass to them under her will, they not being legally her children, but strangers to her. The deed is, I observe, framed on the model of the previous deed, which had been executed by her husband on his death-bed.

Now, it is important to inquire what was the indebtedness of Mrs. Johnson when she executed the deed. She appears to have had some current debts, mostly, if not entirely, in respect of the farming business. She owed a Mr. Simpson, a witness in the case, an account for saddlery, the whole of which (with possibly one unimportant exception) was due in respect of the carrying on of the farm. She owed her sister Sarah Golden £80, and I cannot infer that that money was borrowed for any other purpose than carrying on the farm, because it is for the plaintiff to show that that was so, and he has had Sarah Golden in the box and has not asked her anything about it. The sum of £120 was owing from Judith Johnson to her brother William Golden, the plaintiff. That sum was borrowed by William Johnson, and when she became the owner of the farm she adopted the debt by executing a promissory note, and there was a mortgage debt upon the farm, which had also been a debt of William Johnson. It appears by the evidence that Mrs. Johnson was a person of good repute among her friends, as a respectable and honest woman, who paid her way, and was in no difficulty. Beyond what I have mentioned she does not appear to have owed anything except ordinary current debts, and was not pressed by a single creditor. That was the state of things when this instrument was executed. One other fact I must mention with regard to the state of the family, which is this: that litigation had been going on which led to some alienation of feeling between Mrs. Johnson and other members of the family, and which made it more natural that she should desire the whole of this farm to go

for the benefit of her two daughters. Mr. Gillam appears to have been the most natural person to select as trustee of the deed, if the purpose of the parties was honest and fair. From what I have seen of him, I do not believe he is a person who would have been a party to a deed which was intended to be kept secret, or to be entered into for the purpose of fraud. I think his selection as trustee is an indication of the good faith with which the transaction was conceived.

With regard to what took place under the deed, it appears to me that there was neither concealment nor publication. Mrs. Johnson's name continued to be used as before with regard to the farm. The daughter continued to make the payments, and there was no material change in the way that things were carried on.

The circumstances, looked at independently of the result of the deed, therefore led me to the conclusion that the intention of the parties was to make a perfectly honest family arrangement, under which the daughters were to undertake the burden of paying their mother's debts, and in consideration of that, to take immediately that farm which in all probability they would otherwise have received by will upon their mother's death.

Then it is said, and said truly, that a person must generally be taken to intend the result of his acts. That is often, but by no means always, true, because, although no doubt the immediate and main result of our acts must be the object of our intention, there are many collateral results of acts which are not only not objects of our intention, but against our wish. There are many unintentional results of intentional acts. The operation of the deed, it is said in this case, was to defeat and delay creditors, therefore it is said that that must have been intended. That argument has been presented in two ways. In the first place it has been observed that the deed contained a provision only for the payment of creditors whose debts had been contracted in connection with carrying on the farm: It is said that there must have been debts of other descriptions, and that there was in fact one debt at any rate of another description. But it does not appear to me to be shown that that debt was present to the mind of the settlor, Mrs. Johnson, or to the mind of her daughter; and nothing is more probable, if I were to speculate upon the intention, than that Mrs. Johnson, having adopted the debt of William Johnson, after a deed conceived in similar terms, would have anticipated that her daughters must in like manner adopt the debt of their uncle under this deed. It appears plain from the case of *Holmes v. Penney*, 3 K. & J. 90, that the mere fact of a *bona fide* creditor being defeated is not of itself sufficient to set aside a deed founded on valuable consideration. In this case, if I uphold the deed, it seems probable that the plaintiff will have no remedy in respect of his debt. In that case, by upholding the deed, the plaintiff was excluded from all remedy in respect of his debt, and that debt must have been plainly present to the mind of the settlor, but the Vice-Chancellor thought that the only object of the brother, who was the purchaser of the estate, was to

make an honest family arrangement with regard to it. So it appears to me, in the present case, that the object of the mother and daughters was to make an honest family settlement of the property.

Then again it is said that with respect to many creditors who are included in the covenant, they are defeated and delayed, because before the execution of the deed they had a right against the property, and after the execution of the deed they would only have a right to the enforcement of the covenant. But that is the result of almost any dealing. If I am indebted and sell my estate, my creditors lose their right of proceeding against the estate, and can only proceed against the purchase-money. So in a variety of cases visible chattels or real estate are converted into choses in action, and if creditors could complain of that it would, as Sir Thomas Plumer pointed out, "restrain honest dealings and transactions between man and man."

There is only one other point on which I wish to observe, although it has not been put to me. It appears plain, that though valuable and good consideration was given by the daughters, that consideration cannot have been the full value of the estate. But it also appears to me to be plain that when a *bona fide* and honest instrument is executed for which valuable consideration is given, and the instrument is one between relatives, the court cannot say that the difference between the real value of the estate and the consideration given is a badge of fraud, and if it is not a badge of fraud, or evidence of an intention to defeat creditors, it has no relation to the case.

I have come, therefore, to the conclusion upon the whole of the case, that the instrument impeached was executed in good faith and for a valuable consideration, that it was an honest family arrangement, and was executed without any intention to defraud or delay creditors. That being so, I dismiss the action with costs.

EGERY v. JOHNSON.

SUPREME JUDICIAL COURT OF MAINE, 1879.

[Reported in 70 Maine, 258.]

BILL in equity heard on bill, answers and proof. The material allegations are in the opinion.

The defendant Johnson's answer admitted the ownership of the premises at the time alleged in the bill, and alleged: —

That during 1873 or 4, Nason Brothers were engaged in lumbering operations under a contract with the plaintiffs and on the latter's land, and prior thereto borrowed \$6,100 of the defendant to carry on their business and gave their notes therefor; that on October 23, 1874, to enable Nason Brothers to complete their operations the defendant gave them his negotiable promissory note for \$1,800 on one month; that

Nason Brothers cut and ran down to their mill 1,800,000 lumber, nearly all of which was sawed and shipped to the plaintiffs in Bangor; that during the operation this defendant was assured by Nason Brothers, that when plaintiffs disposed of the lumber his notes should be paid; that he had frequent conversations with plaintiffs in which they informed him that they were receiving and disposing of the lumber and would account for the proceeds; that they held the \$1,800 note and had no doubt that the proceeds of the lumber would be sufficient to pay said note and that the defendant would receive all his pay from Nason Brothers; that confiding in the above assurance, during season 1875 he was induced to build a house on the premises mentioned in the bill, at a cost of more than \$1,000; that receiving nothing from Nason Brothers, he became indebted for materials and labor upon the house; that being seventy-two years old and unable to labor, he was obliged to sell the house and land to the other defendant who paid sufficient money to discharge his indebtedness for labor and materials, amounting to \$250; and in addition thereto agreed to support this defendant during life, which agreement he had faithfully fulfilled to the present date; and that he had no intention to defraud any of his creditors.

That all his creditors were soon after paid by himself or the other defendant, and he believed that the complainants had been fully paid or had in their hands sufficient property or money to pay the note of \$1,800.

The other defendant's answer was substantially the same — alleging *inter alia* that one of the plaintiffs on October 29, 1875, informed him that the lumber was in this plaintiff's hands, and whatever was left after paying their bills would be held in trust for the benefit of the defendant, Johnson, and that he had no doubt that something would be left after all his bills and claims had been paid.

The plaintiffs put in evidence a judgment for \$549.50 debt, recovered on the \$1,800 note, and a levy of the execution on the premises in question.

Johnson testified that he supposed the \$1,800 note was paid when he conveyed, and that was all the debt he owed except bills on the house, which were all paid by Keen.

Albert A. Keen (defendant) testified in substance:

That he had no knowledge of Johnson's indebtedment to the plaintiffs when he purchased the premises; that he paid all the bills on the house, amounting to \$260; that he heard of the \$1,800 note three or four weeks afterward; that the plaintiff Dennett told him that he had no doubt there would be lumber enough to pay them, and what was over he would hold for Johnson's account.

That Johnson conveyed to him mortgages on three other houses and some box boards, that he would like to sell the property mortgaged for the amount due on the mortgages; that he had of Johnson a note against Brown & Smith for \$500 which had not been paid, but was in suit.

Wilson & Woodard, for the plaintiff.

D. N. Mortland, for the defendants.

VIRGIN, J. The complainants allege that on, and for some time prior to October 29, 1875, they were creditors of the defendant Johnson, who then owned certain real estate described, and which he then conveyed, without adequate consideration, to his grandson, the other defendant, to defraud and hinder the complainants; that they recovered a judgment against the grantor and levied their execution upon the real estate so conveyed; and they pray that the defendants shall release all their apparent title to the land levied upon to the complainants.

Some objection is made to the form of the bill. What might have been the result had the defendants demurred, we need not now inquire.

Both defendants deny in their respective answers any intention to defraud or delay creditors, and expressly testify to the same. And we feel so uncertain of any fraudulent intent in fact, that were such intent absolutely essential to the maintenance of the bill we should dismiss it.

But the answers *inter alia* respectively allege in substance — That Johnson sold and conveyed to Keen the land in controversy together with the new house built thereon at a cost of one thousand dollars, for the sum of two hundred and sixty dollars and an agreement “to take Johnson to Keen’s house and support and maintain him during the remainder of his life; which he had faithfully done to the present time.” And if this conveyance left the debtor insolvent, it was fraud in law.

Creditors have an equitable interest in the property of their respective debtors — it being the foundation of trusting them — which the law will, under certain circumstances, enforce. But the interests of a *bona fide* purchaser of a debtor’s property are superior, “for the obvious reason,” says SELDEN, J., “that the latter has not, like a mere general creditor, trusted to the personal responsibility of the debtor, but has paid the consideration upon the faith of the debtor’s actual title to the specific property transferred.” *Seymour v. Wilson*, 19 N. Y. 417. Hence the rights of a *bona fide* grantee, who has paid a full valuable consideration, are protected, though the grantor may have been actuated by a fraudulent intention.

Still a grantee is not protected when he has not paid such a consideration, though he may have acted in good faith. The two must concur. The amount of consideration is not material when the grantor is solvent. (*Usher v. Hardtime*, 5 Me. 471; *Hapgood v. Fisher*, 34 Me. 407); but when insolvent, the kind and amount of consideration do become material even in the absence of actual intent to defraud. Thus an agreement to support an insolvent grantor may be a valuable consideration, but it is not sufficient to uphold a conveyance as against prior creditors (*Rollins v. Mooers*, 25 Me. 192, 199), even if there were no actual intent to defraud. *Webster v. Withey*, 25 Me. 326. Persons taking a conveyance from such a grantor for such a consideration must take care that the existing debts of the grantor are paid (*Hapgood v. Fisher*, 34 Me. 407); and it is immaterial that the consideration comprises

a present sum of money paid in addition to the agreement for support, provided the money alone were palpably inadequate. *Sidensparker v. Sidensparker*, 52 Me. 481.

That Keen received a conveyance and transfer of all Johnson's remaining property is evident. He not only received a deed of the land in question, but a transfer of two mortgages and a note. His counsel in his brief speaks of the land as "the last bit of property that he (Johnson) had held in his hands," etc.; and "that he (Keen) took a conveyance of his (Johnson's) property which was left," etc.

Thus we see that the defendants are guilty of a constructive or legal fraud, which though not originating in any actual evil design to perpetrate a positive fraud upon Johnson's creditors, yet is deemed reprehensible and is prohibited by the law since it is equally prejudicial to the creditor's interests. 1 Story's Eq. § 258.

We do not think the defendants' proposition in relation to estoppel is tenable. There is no evidence that the plaintiffs stood by and saw Johnson convey to Keen without objection.

APPLETON, C. J., BARROWS, DANFORTH, PETERS, and SYMONDS, JJ., concurred.

*Bill sustained; decree as prayed for.*¹

¹ For many cases in accord, see 14 Am. & Eng. Cyc. of Law (2d ed.), 246. But see *Tibbals v. Jacobs*, 31 Conn. 428.

In *Kelsey v. Kelley*, 63 Vt. 41, 50, the court say: "This is a case in equity, in which the orator must do, as well as receive, equity. The master has not found that these transactions between the intestate and these defendants were tainted with fraud in fact, nor does the bill charge fraud in fact. If now, after the defendants have fully supported the intestate and his wife, at an expense greater than the money received, the orator can compel a return of the money received sufficient to pay the creditors represented by the orator, these defendants are left with a debt of an equal amount, also provable against the estate represented by the orator. Why should the creditors represented by the orator receive payment more than the defendants? The defendants have been guilty of no wrong in supporting their father and mother, nor was it any more a wrong for them to receive payment for such support than for the creditors represented by the orator to receive payment for their debts. These creditors did not know of the existence of the property received by the defendants for the support, and did nothing on the strength of its existence. On the other hand the defendants knew of it, and furnished the support for it. If they had furnished the support before receiving payment therefor, and then received the same property which they did receive, no one would claim that the orator could recover the property back, to pay the creditors represented by him. If the creditors represented by the orator had intervened before the defendants had furnished the support, they would have had the better right to the property, and the defendants have sustained no damage. Their intervention would have released the defendants from the contract to furnish further support. The consideration for this contract further to support would have been taken away. The defendants, until they had furnished the full support, were like a purchaser *bona fide* in every respect, except he had not fully paid the contract price of the property purchased, where he must be a *bona fide* purchaser for value, to be protected in his purchase; if otherwise a *bona fide* purchaser, he is protected only to the extent he has paid value. But although he does not pay full value at the time of the purchase, if such payment is made in full, before he is made aware of the infirmity of his purchase, he is fully protected. We think this principle applicable between the orator and these defendants, especially the wife, on the facts of this case. Conveyances of property to secure future support, until the support is furnished, have the infirmity of voluntary conveyances, or

IN RE TETLEY. EX PARTE JEFFREY.

IN THE QUEEN'S BENCH DIVISION, JULY 20-23, 1896.

[Reported in 66 Law Journal, Queen's Bench, 111.]

MOTION by the trustee in bankruptcy of Maxwell Tetley for an order declaring that a post-nuptial settlement, dated October 30, 1894, made by the bankrupt was fraudulent and void as against the trustee, and that it might be set aside.

In 1894 the bankrupt, who was then under age, and had recently married, was entitled absolutely under his father's will to a sum of £12,000 on attaining twenty-one, and also to one-twelfth share of his father's estate upon the death of his mother, Isabella Maxwell Tetley, who was then between sixty and seventy years of age. He was a young man of careless and extravagant habits, and had already during his minority incurred debts to a considerable amount. Under these circumstances he was advised, by his solicitor, to execute as soon as he attained his majority a settlement of his property for the benefit of himself, his wife, and any children that might be born of the marriage. With a view to ascertaining the best course to be adopted for carrying out the matter, a case on his behalf was submitted to counsel for his opinion. Counsel advised that a settlement in very stringent terms should be executed by the bankrupt directly he came of age, excluding only from the property settled a sum of £3,000 to be applied in payment of his debts; that although his life interest could not be made determinable on bankruptcy, it could be made to cease upon alienation whether voluntary or involuntary (not being bankruptcy), so that he would be able, if bankruptcy were impending, to create a charge on his life estate which would at once forfeit it, and the trusts inserted for the benefit of his wife and children would then take effect; that such a settlement would, of course, be liable to be attacked under the act of Elizabeth and the bankruptcy act. And he suggested that a member of the family should make some allowance "so as to render the settle-

conveyances for which a full, valuable consideration is not paid at the time the conveyance is made. It is well settled that supineness of a creditor to attack and have such conveyances set aside may defeat his right. *Egleberger v. Kibler*, 1 Hill (S. C.), Ch. 113 (26 Am. Dec. 192). Such conveyances may be validated by *ex post facto* acts. *Verplanck v. Sterry*, 12 Johns. 536 (7 Am. Dec. 348).

"While these cases are not analogous in their facts to the facts in the case at bar, we think this case is controlled by the same equitable principles. When this suit was brought, in principle, the defendants stood related to the money received for the support of the intestate and wife, in equity, just as they would if they had first furnished the support, and then received the money in payment therefor. The intestate then might well prefer them, in making payment of his debts, to the creditors represented by the orator."

Smith v. Pierce, 65 Vt. 200; *Darling v. Ricker*, 68 Vt. 471; *Hisle v. Rudasill*, 89 Va. 519, acc. See also *Nichols v. Burch*, 128 Ind. 324; *Walker v. Cady*, 106 Mich. 21, 26; *Reynolds, Admrs. v. Gawthrop's Heirs*, 37 W. Va. 3, 11.

ment one for valuable consideration within the principle of *Hance v. Harding*, 20 Q. B. D. 732." This opinion was shown to the bankrupt's family and their solicitors, and it was eventually arranged that the bankrupt's mother should agree to pay him £50 a year until her death, and that the bankrupt's brother, C. F. Tetley, should advance him £25 a year, to be repaid with compound interest at the rate of four per cent on the death of the mother. The settlement was accordingly so framed, and was duly executed by the bankrupt immediately on his attaining twenty-one, on October 30, 1894. At the date of the execution of the settlement the bankrupt was solvent. In pursuance of the provisions in the deed, Mrs. Tetley and C. F. Tetley had duly paid the annuities of £50 and £25 covenanted to be paid by them to the trustees of the settlement.

In May, 1895, the bankrupt charged his life interest under the settlement in favor of a creditor, and thereafter the trustee had applied the income thereof for the benefit of the bankrupt's wife.

On September 21, 1895, a receiving order was made against the bankrupt, and on November 8, 1895, he was adjudicated a bankrupt.

The only assets of the bankrupt were the property comprised in the settlement.

VAUGHAN WILLIAMS, J., referred to the notice of motion and continued: The settlement was impeached on two grounds, — first, as being void under section 47 of the bankruptcy act, 1883,¹ as not being a settlement for valuable consideration, made in good faith; and, secondly, as being fraudulent under the statute of Elizabeth, and made to defeat and delay creditors.

The real question I have to decide is, in both aspects, whether the settlement was made in good faith, or made to defeat and delay creditors. There is no doubt the settlement was made for valuable consid-

¹ 47. (1) Any settlement of property not being a settlement made before and in consideration of marriage, or made in favor of a purchaser or incumbrances in good faith, and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage by right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy, and shall, if the settlor becomes bankrupt at any subsequent time within ten years of the date of the settlement, be void against the trustee in the bankruptcy, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof.

(2) Any covenant or contract made in consideration of marriage, for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent in possession or remainder, and not being money or property of or in right of his wife, shall, on his becoming bankrupt before the property or money has been actually transferred or paid pursuant to the contract or covenant, be void against the trustee in the bankruptcy.

(3) "Settlement" shall, for the purpose of this section, include any conveyance or transfer of property.

eration. In my opinion, the £50 a year which was to be provided by the mother is not a mere colorable or fictitious consideration, but a real valuable consideration. With regard to the £25 a year which was to be provided by the brother, I need not decide whether that would be a good consideration to constitute a valuable consideration within the meaning of section 47; but I can only say that in looking through the cases on the statute of Elizabeth, I find more than one case in which the making of a loan by some member of the family has been held to be a sufficient consideration to prevent the settlement being a voluntary settlement; and I am disposed, therefore, to think that in considering whether or not there was a substantial consideration here, — a sufficient consideration to make a valuable consideration within the meaning of section 47 of the bankruptcy act, 1883, — one ought to take into consideration not only the £50 a year, but also the £25 a year. But be that how it may, I should myself have found the £50 a year alone was a sufficient consideration, and therefore it is not necessary to decide the other matter. But then it is argued that the settlement was not made in good faith, and several suggestions are made in support of this contention. First, it is said that the young man was of extravagant habits, and likely to get into debt, and therefore the settlement must have been made with the intention of defeating or delaying the future creditors whom it might be anticipated the extravagant habits of the young man would necessarily create. I do not think this argument good. One object of every marriage settlement, whether ante-nuptial or post-nuptial, is to preserve the property settled on the wife, or the wife and children as the case may be, and to deprive the settlor, the husband, of the power of dealing with the property inconsistently with the settlement, even if he should be so minded, and to leave the property subject to be appropriated to the payment of the husband's debts would be to defeat this necessary and essential object. To say that a post-nuptial settlement made by a husband for valuable consideration is void against creditors if made with this object, is to say that all post-nuptial settlements are bad. This could not be argued; so counsel for the trustee in bankruptcy contended that a settlement was void in cases where the husband was known by the purchaser from whom the valuable consideration passed to be of extravagant habits. I cannot accede to that argument. I never knew a settlement for valuable consideration being held void or fraudulent under the bankruptcy statutes, or under the statute of Elizabeth, on this ground. On the contrary, in *Thompson v. Webster*, 4 De G. & J. 600, a settlement for valuable consideration — the consideration being a loan to the settlor by his mother — was held not void within the statute of Elizabeth, although the settlor was given to debt and prone to suretyship, and that to the knowledge of his mother. And again in *Holmes v. Penney*, 3 K. & J. 90, it is stated that the husband was a man of extravagant habits to the knowledge of his father, the purchaser. I think that this suggestion that the knowledge that the husband is of extravagant

habits, and the desire of the family to protect the property against, amongst other things, those extravagant habits, makes the settlement void, fails.

Secondly, it is said that the fact, if fact it be, that the suggestion of a valuable consideration came from the solicitor to the settlor, and not from the purchaser giving the consideration, shows that the settlement was not made in good faith. Here again, I cannot agree. This was the fact in *Ex parte Eyre*, 44 L. T. 922, — I mean the suggestion of the settlement came from the solicitor for the husband. More than that, the reason of the suggestion being by the solicitor for the husband above everything was in that case the extravagant habits of the husband. It is true that in that case his intemperate habits were added to his extravagant habits, but I do not think that makes any difference.

Thirdly, it is said that if the settlement is a settlement for valuable consideration, and not otherwise impeachable, it is nevertheless impeachable because it was not made in good faith, but with the intention to defeat and delay creditors; and in support of this contention counsel for the trustee relied on a passage in an opinion of counsel, which opinion was shown to the purchasers and their solicitors. Now I wish to point out that counsel, when he makes the suggestion about the debtor being able if bankruptcy were impending to create a charge, is not dealing with the actual settlement that was executed, but a purely voluntary settlement, and it is with reference to that that he makes the suggestion that the husband might take this step, no doubt for the purpose of defeating and delaying creditors. Now this objection seems to me to be much more formidable than any of the other objections. No doubt this is a case in which, there being value given for the settlement, there must be evidence of an actual or express intent to defeat and delay creditors before one can find the settlement void. I say that

in distinction to the case of a voluntary settlement where it is not necessary that there should be any such evidence. It is only necessary that the facts should be such that the settlement has a necessary tendency to defeat and delay creditors. In the case of a voluntary settlement, however honestly the settlor may execute it, however little he may be thinking of his creditors at the time he executes it, however free he may be from any desire to defeat or delay his creditors, — the settlement, if voluntary, is void as against creditors if its necessary tendency is to defeat and delay them. As I have said in the case of a settlement for valuable consideration, that is not so. You must prove the actual intention to defeat and delay creditors. But if this intent is proved, I take it that the whole settlement is void, and not merely the trust with regard to the life interest. Now, in form, the trust in the present case giving the husband the life estate with a gift over, in case of alienation, is, in a settlement for valuable consideration, unobjectionable. See *Detmold v. Detmold*, 40 Ch. D. 585. Counsel for the trustee in bankruptcy spoke of it as the “so-called authority of *Detmold v. Detmold*.” I do not know why he said that. It is a decision of Mr.

Justice North, and he seems to have dealt with the very point; and I observe that in *Mackintosh v. Pogose* [1895], 1 Ch. 505, which is the latest authority upon the subject, Mr. Justice Stirling refers to *Detmold v. Detmold* as a binding authority, stating the law. *Detmold v. Detmold* decides that a settlement for valuable consideration in that form is unobjectionable. At all events, effect was given to the settlement, notwithstanding that subsequently to the alienation which divested the husband's estate the husband was made bankrupt. But it would seem that a clause giving the settlor a life interest until bankruptcy is void against creditors. The decision of Mr. Justice Stirling in *Mackintosh v. Pogose* is an authority for this proposition. I gather from his judgment that it was an open question down to that decision, although Lord Cairns, in the House of Lords, had, prior to that, expressed an opinion that even in a settlement for valuable consideration such a proviso for determination of the settlor's estate would be void. I have not to decide that; I have only to decide whether the settlement in the form that it took in this case can be sustained. It seems to me that it can. But to come back to the only question that I now really have to decide, — which is, whether there is such evidence that I ought to find that this settlement for valuable consideration was in fact executed to defeat and delay creditors. It seems to me that apart from the passages I have just read from the opinion of counsel, there is no evidence of any intention to defeat and delay creditors. So far as the existing creditors were concerned, I am of opinion that the fact that the purchasers — that is to say, the family, who were advised by a highly respectable firm of solicitors — were careful to inquire as to what debts contracted in infancy by the settlor there were which he could be sued for, or which properly ought to be paid, and the fact that £3,000 was left out of the settlement for the express purpose of paying those debts, are matters going to negative the suggestion that the family, the purchasers here, had any intention to defeat and delay creditors. It is quite true that I gather from the evidence of Burt, the trustee, that in fact there are considerable amounts — something over £1,000 — of debts for necessities which are unpaid; but I do not think that that fact can affect the purchasers here, unless they intended the money should not be applied in payment of those just debts, or were utterly careless whether it was paid or not. I do not think that that is so here. I think that they did wish that all this young man's debts should be paid, and that he, having married, they hoped that he might take a more serious view of life, and would try, for the sake of his wife, to live within his income. Counsel for the trustee in bankruptcy urged that all that was necessary here was to show that there was a want of good faith on the part of the bankrupt. I do not see that that is established here, but I utterly dissent from the proposition. It seems to me that it is perfectly plain, not only from the case of *Mackintosh v. Pogose*, but many other cases, that the good faith to be looked at is the good faith of the purchaser, and not the good faith of the settlor. I put it

to myself: Am I, with this evidence before me of the wish and intention of these people that the just debts of this young man should be satisfied, and that a sufficient sum should be left outside the settlement and appropriated to that purpose, to find that there was a dishonest intention merely because the opinion of counsel with regard to a voluntary settlement was such as I have read? I think not. Then with regard to the settlement itself, it was strenuously argued that the settlement by its form was such as to show that the real intention was to leave the property in the control of the husband unless and until he should become bankrupt. Something was said about the trust being revocable with the consent of the trustees, but I did not understand that part of the case to be seriously pressed. I have read through the settlement, and although it does seem to me a settlement which has given as much control as possible to a husband in a marriage settlement which is intended to be effective, yet I am not prepared to say that there is anything in the form of the settlement which ought to make me hold it void as against creditors. In conclusion, I can only say that, holding as I do that this is a settlement for valuable consideration, I am not prepared to hold it void as not being executed in good faith. On the contrary, I think the case really comes within the statement in the two passages from the judgments of Lord Esher and Sir James Hannen in *Hance v. Harding*, 20 Q. B. D. 732, to which I will refer. Lord Esher says: "It appears to me, on consideration of all the circumstances, that the motive of both of the parties to this settlement had no regard to the son's being pressed by his creditors, or to any tangible probability that the son would become insolvent or bankrupt, but had regard to another matter altogether, — namely, to the fact that the son had become involved in an unfortunate connection and had contracted intemperate habits," — matters that might be likely to lead to extravagance. Then Sir James Hannen says: "I think the evidence entirely supports the conclusion of the learned judge in the court below, — namely, that the transaction was entered into by all parties with perfect *bona fides*, and had nothing to do with any intention to defeat the son's creditors, but was dictated by prudential motives having reference to the necessity for protecting his family, which had arisen out of his conduct with some woman with whom he had become connected." I think, therefore, in this case the settlement had really nothing to do with defeating and delaying creditors, and that the object was really to comply with the necessity that had arisen, now that this young man had married, of protecting some property for his wife. That could not be done by a voluntary settlement, and the family came forward and provided this money which enabled it to be done. The only other observation I would make is to say that I have not forgotten or failed to look at the cases of *Freeman v. Pope*, L. R. 5 Ch. 538, and *Mackay v. Douglas*, L. R. 14 Eq. 106, in which it was held that, where a man who nowadays settled his property in contemplation of entering upon a hazardous trade, that was a settlement made for the purpose of defeating and delaying creditors,

although there might be no creditor in existence at the time when the settlement was sought to be voided who was a creditor at the date when the settlement was made. But I do not think that the mere fact that a man is of extravagant habits at all brings the case within *Freeman v. Pope*, or creates any tangible probability that the man may become insolvent. Under these circumstances I must uphold this settlement, and the application of the trustee must be dismissed. With regard to the costs, I think, as pointed out by Lord Justice Turner in *Thompson v. Webster*, 4 De G. & J. 600, that where a settlement is made under circumstances which make it right for the trustee in bankruptcy to investigate the transaction, costs ought not to be given against him. There will, therefore, be no order as to costs.¹

STRATTON v. PUTNEY.

NEW HAMPSHIRE SUPREME COURT, DECEMBER, 1885.

[Reported in 63 *New Hampshire*, 577.]

THE two cases are bills in equity to remove a cloud from the title to land in Antrim. Facts found by the court: July 7, 1882, the defendant Putney, being the owner of the land in question, conveyed it to the defendant Elliott by a deed absolute on its face, but in reality to secure a loan of \$2,000 about that time made by Elliott to him. The conveyance was not made to hinder or delay creditors, nor with any intent to defraud them. Putney paid \$700 of the money thus obtained to the plaintiffs, Stratton, Merrill & Co., upon their account against him, and the remainder of the money he used in paying other accounts for merchandise and in his business, and in completing the store on the premises. Putney's liabilities were considerable at the time of the conveyance, and he was in embarrassed circumstances.

February 20, 1884, the plaintiffs in both actions attached the premises on writs against Putney, and having obtained judgments at the March term, 1884, caused the executions issued thereon to be duly levied upon the premises; and it is by virtue of that levy that they claim title as against the defendant Elliott.

Albin & Martin, for the plaintiffs.

Briggs & Huse, for the defendants.

SMITH, J. The conveyance by Putney to Elliott, and the agreement executed by them in pursuance of the understanding entered into at the time of the negotiation for the conveyance of the land, that Elliott would reconvey to Putney upon repayment of the purchase-money, were in effect a loan by Elliott to Putney of \$2,000, and a taking of

¹ *Conf. Gray*, *Restraints on Alienation* (2d ed.), §§ 90-100; *Re Brewer's settlement*, 75 L. T. Rep. N. S. 177; *Mackintosh v. Pogose*, [1895] 1 Ch. 505.

F
D security for the loan by deed absolute upon its face. The value of the land exceeded the amount of the loan, and Putney was in embarrassed circumstances. The law does not permit debts to be secured in this manner as against creditors. A secret understanding, that on payment of the debt the land shall be reconveyed, constitutes a secret trust that renders the conveyance void against subsequent as well as existing creditors. The conveyance is deemed fraudulent, whether the actual purpose to defraud is found as a fact, or is conclusively presumed from admitted facts. The trust being established, the intent to defraud creditors is conclusively presumed. Such a trust is inconsistent with an absolute sale. *Smith v. Lowell*, 6 N. H. 67; *Paul v. Crooker*, 8 N. H. 288; *Winkley v. Hill*, 9 N. H. 31; *Tift v. Walker*, 10 N. H. 150; *McConihe v. Sawyer*, 12 N. H. 403; *Page v. Carpenter*, 10 N. H. 77; *Towle v. Hoit*, 14 N. H. 61; *Ladd v. Wiggin*, 35 N. H. 421, 426; *Coolidge v. Melvin*, 42 N. H. 510; *Putnam v. Osgood*, 51 N. H. 192 — s. c., 52 N. H. 148; *Ranlett v. Blodgett*, 17 N. H. 298; *Coburn v. Pickering*, 3 N. H. 415; *Lang v. Stockwell*, 55 N. H. 561; *Cutting v. Jackson*, 56 N. H. 253; *Plaisted v. Holmes*, 58 N. H. 293 — s. c., 58 N. H. 619; *Sumner v. Dalton*, 58 N. H. 295.

ALLEN, J., did not sit; the others concurred.

*Decree for the plaintiffs.*¹

SECTION I. (*continued*)

(b) VOLUNTARY SETTLEMENTS AND CONVEYANCES.

READE v. LIVINGSTON.

NEW YORK COURT OF CHANCERY, 1818.

[*Reported in 3 Johnson's Chancery*, 481.]

THE CHANCELLOR [KENT]. This case turns upon the validity of the conveyance by Henry G. Livingston to Gilbert Aspinwall.

The bill charges, that Livingston was indebted to John Reade, the plaintiff's intestate, as early as the year 1800, in \$6,000, and that in August term, 1807, Reade obtained a judgment against H. G. L., for upwards of that sum, and that \$3,072 of it remains unpaid. That by deed, dated the 7th of December, 1805, H. G. L. conveyed his lands, to the amount in value of \$45,000, to Aspinwall, in trust for his wife, and that he had no other property to satisfy the balance of the judgment.

The answer of H. G. L., and of his wife, admitted that in 1800 there were sundry unsettled accounts between the parties, and that

¹ Many cases in accord are collected in *Wait on Fraudulent Conveyances*, § 272; 14 Am. & Eng. Encyc. of Law (2d ed.), 247.

they were finally, by rule of court, referred to referees, and that the judgment upon such reference was rendered, as charged in the bill; they admit further, that the lands included in the deed to Aspinwall composed the greater part of the real estate of H. G. L., though they deny the lands to be of the value charged. H. G. L. states that, prior to his marriage, and with a view to it, he agreed with his wife's father to settle on her, and her children, \$30,000, and that the deed was executed in pursuance of that agreement. He admits the sum of \$1,392, and 92 cents, to be still due upon the judgment, and that Reade might have obtained satisfaction out of his personal estate; and he declares that he was then worth little or no property, though at the time of his marriage he was worth \$80,000.

It appears by the proof taken in the cause, that the judgment was founded upon two bonds dated in the year 1794; that the consideration of them was a farm sold by Reade to H. G. L., and that with the proceeds, or by the exchange of that farm, H. G. L. procured the greater part of the lands included in the deed of settlement. That he was married as early as the year 1791, and that at the date of the judgment he owned personal property to \$1,000, but it does not appear that he possessed any real property free from incumbrance. Valentine Nutter, the wife's father, says, that his wife, Mrs. Nutter, informed him, just previous to the marriage, that H. G. L. had promised to settle \$30,000 on his daughter, and that H. G. L., frequently, after the marriage, had admitted the promise, and, at last, at the repeated request of the witness, executed the deed.

The deed to Aspinwall contains no reference to or recital of any previous agreement, but it is simply a deed in fee, for the consideration of \$5,000, and in trust to convey the lands, and the rents and profits thereof, as the wife of H. G. L., by deed or will, should direct; and, in default of such direction, in trust for her heirs.¹

If the settlement be considered, as I think it ought to be, unconnected with any antenuptial agreement, the simple question then is, whether such a voluntary settlement after marriage by a party, indebted at the time, be not, as against such creditors, absolutely fraudulent and void. 2

I think this question can be most satisfactorily answered in the affirmative; but the manner in which it has been argued imposes on me the necessity of reviewing the cases. D

As early as the case of *Shaw v. Standysh*, 2 Vern. 326, the distinction on the subject of voluntary conveyances, seems to have been taken and understood, between creditors existing at the time of the conveyance, and subsequent creditors, and that it was clearly void as to the former, though not, as of course, against the latter. This was so advanced upon argument in that case, and perhaps it was a distinction

¹ A portion of the opinion is here omitted in which the Chancellor held that because of the Statute of Frauds a parol antenuptial agreement for a settlement gave no added validity to the settlement in question.

of common law growth; for it was agreed in *Twyne's Case*, 3 Co. 83, a., that an estate made by fraud shall be avoided only by him who has prior right, but he who hath subsequent right shall not avoid it. But in the Exchequer case, of *St. Amand v. Barbara*, Comyn's Rep. 255, a settlement was made upon a child by a party indebted by bond, and who afterwards became also indebted by bond. It was admitted as a doubtful point, whether, if the party had not been indebted at the time, the settlement would have been fraudulent as against the subsequent creditors; but as the party was indebted at the time, the settlement was void against debts contracted afterwards, and all the bond creditors were allowed to come in as against the settlement. If the rule was otherwise, it was said, in this case, that the same result would follow in another way; for the subsequent bond creditors would be permitted to stand in the place of the prior bond creditors, and the assets be so marshalled as to satisfy all.

Lord Talbot considered it a doubtful point, and forbore an opinion, in *Jones v. Marsh*, Cases Temp. Talbot, 63, whether a voluntary settlement, without consideration, would be held fraudulent as against a subsequent creditor of many years afterwards. But though there might be doubts on the point at that day, it seems to have been long since settled, that if the party be not indebted at the time, and has no fraudulent views, a subsequent creditor cannot impeach a prior settlement, on the mere ground of its being voluntary. This point was fully explained by Lord Hardwicke, in *Russel v. Hammond*, 1 Atk. 15, where, speaking of voluntary conveyances, he says, he has hardly known a case where the person conveying was indebted at the time, and the settlement not deemed fraudulent; but the conveyance is not fraudulent where the party making it is not indebted at the time. Subsequent debts will not shake such a settlement, unless there be some badge of actual fraud, as a continuance in possession.

The observation of the Chancellor, that "he had hardly known a case," would imply that there had been cases in which a voluntary settlement was held good, even though the party was indebted at the time. But it is sufficient to observe that no such case appears; and we cannot place great reliance on the report, as to the precise words used by the court; especially, as Lord Hardwicke speaks, in other cases, without any such qualification.

In *Stileman v. Ashdown*, 2 Atk. 477; *Brown v. Jones*, 1 Atk. 190; *Wheeler v. Caryl*, Amb. 121; and *Hylton v. Biscoe*, Ves. 304, Lord Hardwicke defined what were good settlements after marriage, as against creditors; and he held those good which were made in consideration of a portion paid at the time by, or on behalf of, the wife, or in consideration of an agreement by articles before marriage. Such settlements are of equal validity with those made before marriage, in consideration of marriage, and which, it is agreed, are good, even though the party may be then indebted. *Nairn v. Prowse*, 6 Ves. 759; *Campion v. Cotton*, 17 Ves. 271, 2; *George v. Milbanke*,

9 Ves. 193. But he said, if the settlement after marriage was in consideration of marriage only, it was voluntary and fraudulent against creditors; and though he was not even indebted at the time, yet if he made the settlement with a view to a future indebtedness, it was equally fraudulent. So, in *Ward v. Shallett*, 2 Ves. 18, he admits a settlement after marriage, in consideration of a portion advanced, or in consideration of the wife parting with a contingent interest secured by her husband's bond before marriage, to be good; but still he qualifies the admission by saying, there must be no "fraud or great inadequacy."

All the cases assume the position to be undeniable, that the husband must not be indebted at the time of the settlement. They leave no possible doubt on the point. In *Middlecome v. Marlow*, 2 Atk. 519, Lord Hardwicke held a post-nuptial settlement good, "there being no proof of the husband being indebted at the time; there was not so much as a single creditor." The settlement in this case was also very reasonable, it being only of the personal estate received from the wife. So, again, in *Taylor v. Jones*, 2 Atk. 600, a settlement after marriage on the wife and children was held fraudulent, as to creditors, under the 13th Eliz.; and this case is worthy of notice for the doctrines which it contains. The settlement was held to be fraudulent as well in respect to creditors after as before the settlement, for the debtor continued in possession of the property settled; and the statute of Eliz. was held to extend equally to the subsequent creditors who were delayed or defrauded. It was further observed by the Master of the Rolls, "that it was not material in that case what the circumstances of the father were at the time of the settlement, any farther than as evidence to show, if he was in indigent circumstances, that it was made with an intent to commit a fraud."

This case contains also a just observation on the sympathy which is usually excited, or attempted to be excited, in these cases, in favor of the objects of the settlement. "I have always," observes the Master of the Rolls, "a great compassion for wife and children; yet, on the other side, it is possible, if creditors should not have their debts, their wives and children may be reduced to want."

In *Walker v. Burrows*, 1 Atk. 93, Lord Hardwicke admitted most explicitly, that if the party was indebted at the time, the voluntary settlement was void; and he admitted, with equal certainty, that if the party was not indebted at the time, or immediately after the execution of the deed (which would be evidence of intentional fraud), the provision for the wife and children would not be affected by subsequent debts. But if the fact of indebtedness at the time be established, then it was held, that "it would have run on so as to take in all subsequent creditors." Mr. Maddock (1 Madd. Ch. Rep. 420, note) says he has seen a MS. note of this case, and that it agrees with the printed report; and this case may be considered as establishing the doctrine, as far as the decision of Lord Hardwicke could establish it, that indebtedness at the time will defeat a post-nuptial voluntary settlement, and that if

it be set aside in favor of a creditor at the time, all the subsequent creditors are let in on the principle of equal apportionment, or marshalling of assets.

Lord Hardwicke's decisions are all consistent on this interesting subject.

Thus, in *White v. Sansom*, 3 Atk. 410, it was a doubtful point whether the plaintiff's debt accrued until after the settlement; and on that doubt the bill was dismissed. In *Beaumont v. Thorp*, already cited, the settlement was by a man indebted at the time, and it was set aside, and all the specialty creditors, before and after the settlement, were let in. So, in *Lord Townshend v. Windham*, 2 Ves. 1, Lord Hardwicke expressed himself in the most explicit and decided manner. He said, that he took it that a man "actually indebted, and conveying voluntarily, always meant to defraud creditors." I understand him to mean here that this was the conclusion of law, which was not to be gainsaid; and he said he knew of no case where a voluntary conveyance to a child by a man indebted at the time, was not set aside for the benefit of creditors; but he said that a voluntary conveyance without any badge of fraud, and by a person not indebted at the time, would be good, though he afterwards became indebted. He spoke strongly in favor of the superiority of the claims of creditors over family provisions, and observed, that "though an unfortunate case may arise in respect to children, for whom parents are bound by nature to provide, it is impossible to say, the consideration in respect of them is of so high a nature as that of paying just debts, and therefore the court never preferred them to just creditors." In *Fitzer v. Fitzer*, 2 Atk. 511, Lord Hardwicke asked the Attorney-General if there was an instance in that court where a conveyance from husband to wife, without any pecuniary consideration moving from the wife, had been held to be good against creditors.

The same rules and distinctions are declared and enforced throughout the subsequent decisions.

In *Stephen v. Olive*, 2 Bro. 90, a settlement was made after marriage, by a person not indebted except in £500, secured by mortgage on the settled estate, and the Master of the Rolls held, that a settlement after marriage in favor of a wife and child, by a person not indebted at the time, was good against subsequent creditors, and he refused to grant relief in this case to a subsequent creditor, notwithstanding the settler was indebted at the time, seeing that the debt existing at the time was secured by a mortgage on all the estate settled. And Lord Eldon afterwards, in *George v. Milbanke*, 9 Ves. 193, allows of the same exception when he says, that if the voluntary settlement contains a provision for the payment of debts then existing, that makes it good against all future creditors.

It cannot escape observation that the only question in these cases was respecting the subsequent creditors. There is no doubt in any case as to the safety and security of the then existing creditor. No

voluntary post-nuptial settlement was ever permitted to affect him; and the cases seem to agree that the subsequent creditors are let in only in particular cases, as where the settlement was made in contemplation of future debts, or where it is requisite to interfere and set aside the settlement in favor of the prior creditor, or where the subsequent creditor can impeach the settlement as fraudulent by reason of the prior indebtedness.

But the case of *Lush v. Wilkinson*, 5 Ves. 384, has been much relied upon, as if it gave more strength to the settlement against subsequent debts, than the prior cases seem willing to allow.

The settlement in that case was on the wife, after marriage, of an annuity charged upon lots subject to two mortgages. The bill was by a subsequent creditor against the executor and widow of the husband, to set aside the deed granting the annuity, and charged that the husband was indebted to several persons, and in insolvent circumstances, at the date of the deed. The answer averred that the husband was not insolvent, and that, except the two mortgages, he did not owe above £100 at the time, and that none of the debts were due at his death.

It was contended, on the part of the defendants, that there was no evidence of any debt at the time, except the two mortgages, for the plaintiff produced no testimony; and the opinion of Lord Mansfield, in *Doe v. Routledge*, Cowp. 705, was referred to, in which he considers that the validity of a voluntary settlement depended on the fact whether the settler was indebted at the time. The counsel on the other side admitted the law to be, that there must be a debt at the time. Lord Alvanley, the Master of the Rolls, then observes, that the plaintiff appeared as a subsequent creditor, and without proving any one antecedent debt, and he comes with a fishing bill, and desires an account and an inquiry, in order to prove antecedent debts; and the bill was dismissed, with liberty to file another.

This was the case of a subsequent creditor, and therefore it does not apply to the case before me, except so far as it assumes, like all the other cases, the rule to be settled, that a voluntary settlement never can impair a subsisting debt. But there is a dictum of the Master of the Rolls in this case which has been thought to be of some moment, where he observes, that "a single antecedent debt will not do. Every man must be indebted for the common bills for his house. It must depend upon this whether he was in insolvent circumstances at the time."

Such a loose dictum, one would suppose, was not of much weight; especially as there is no preceding case which gives the least countenance to it. Another Master of the Rolls had before said, in *Taylor v. Jones*, already cited, that the circumstances of the settler at the time of the settlement were not material, except as to the question of actual, intentional fraud; and that intention, we know, is never the inquiry in respect to the demands of the prior creditors. If insolvency

can ever be made a question, as to these voluntary settlements, it can only be in respect to the subsequent creditors, and Lord Alvanley was speaking of such a case, and of none other. But even here the cases are numerous to show, that if the settlement be once set aside by the prior creditors, subsequent creditors are entitled to come in, and be paid out of the proceeds of the settled estate.

In *Kidney v. Coussmaker*, 12 Ves. 136, the question was on a post-nuptial settlement as against creditors, and it was insisted that they were entitled to defeat it, if the settler was indebted at the time; but there was said to be no proof of a single debt existing at the date of the settlement. Sir Wm. Grant, in giving his opinion, observed, that in *Lush v. Wilkinson* the bill was filed for the purpose of affecting the settlement, upon the ground that the settler was insolvent at the time it was made, and that there was no evidence in support of such a charge, and the bill was dismissed. He said he was disposed to follow the decision of Lord Rosslyn, in *Montague v. Lord Sandwich* (July, 1797, cited *ib.* p. 148, and 5 Ves. 386, note), that the settlement was fraudulent only as against such creditors as were creditors at the time.

Lord Rosslyn, in the case referred to, declared a settlement void as to the creditors, prior to its date. There was no question of insolvency made, but it was clearly held, by Lord Rosslyn, in that case (see 12 Ves. 156, note), that if the settlement be affected as fraudulent against such creditors, the subject is thrown into assets, and all subsequent creditors are let in.

The last case on the subject which I shall notice is that of *Holloway v. Millard*, 1 Madd. Ch. Rep. 414. That was a bill by creditors against the parties to a voluntary settlement upon a natural child, praying that the deficiency of assets, if any, might be made good out of the settled estate. The plaintiffs were subsequent creditors, and the bill did not state that the party was indebted when the settlement was made.

The counsel for the plaintiffs contended, that if it was necessary to show that the party was indebted at the time, a reference ought to be ordered for that purpose, but it was observed, on the other side, that there was no charge in the bill to warrant the inquiry, and that a man must be indebted, and largely so, to render the settlement invalid; mere trifling debts in the course of house-keeping would not be sufficient.

The Vice-Chancellor, in giving his opinion, said, that the settler here was not indebted at the time, and that a voluntary conveyance could not be avoided by subsequent creditors, except on the ground of a fraudulent intent; for that it was clear that a voluntary settlement, even in favor of a stranger, by a person not indebted at the time, nor meaning a fraud, was good against subsequent creditors. But he said, further, that a voluntary disposition, even in favor of a child, was not good if the party was indebted; and he refused an inquiry whether the party

was indebted at the time, because there was no foundation for such an inquiry laid by the bill.

The conclusion to be drawn from the cases is, that if the party be indebted at the time of the voluntary settlement, it is presumed to be fraudulent in respect to such debts, and no circumstance will permit those debts to be affected by the settlement, or repel the legal presumption of fraud. The presumption of law in this case does not depend upon the amount of the debts, or the extent of the property in settlement, or the circumstances of the party. There is no such line of distinction set up, or traced in any of the cases. The attempt would be embarrassing, if not dangerous to the rights of the creditor, and prove an inlet to fraud. The law has, therefore, wisely disabled the debtor from making any voluntary settlement of his estate, to stand in the way of his existing debts. This is the clear and uniform doctrine of the cases, and it is sufficient for the decision of the present cause.¹

¹ Early v. Owens, 68 Ala. 171; McTeers v. Perkins, 106 Ala. 411; Beall v. Lehman, Durr Co. 110 Ala. 446, 450; Barbour & Carroll's Ky. Stats., § 1907; Hanson v. Buckner's Ex., 4 Dana, 251; Miller v. Desha, 3 Bush, 212; Fellows v. Smith, 40 Mich. 689; Swayze v. Doe, 21 Miss. 317 (overruled by Wilson v. Kohlheim, 46 Miss. 346); Hurley v. Taylor, 78 Mo. 238; Loehr v. Murphy, 45 Mo. App. 519 (overruled by Hoffman v. Nolte, 127 Mo. 120; Glacier v. Walker, 69 Mo. App. 288); City National Bank v. Hamilton, 34 N. J. Eq. 158; Gardner v. Kleinke, 46 N. J. Eq. 90; O'Daniel v. Crawford, 4 Dev. 197 (modified by Code, § 1547. See Clement v. Cozart, 112 N. C. 412); Jackson v. Lewis, 34 S. C. 1; Fink v. Denny, 75 Va. 663; Flynn v. Jackson, 93 Va. 341; Rogers v. Verlander, 30 W. Va. 619, acc.

In Babcock v. Eckler, 24 N. Y. 623, 632, the court said: "This decision [Reade v. Livingston] assumed as a principle of law, that a voluntary conveyance was void as to any and all then existing creditors, without regard to the question of intention, because it might ultimately operate to defeat the collection or payment of their debts. A similar doctrine was held by the Chancellor in Bayard v. Hoffman, 4 Johns. Ch. 450. It is not important now to inquire how far this doctrine was supported by the cases cited by the Chancellor. Certainly, Lord Mansfield held a different doctrine in Cadogan v. Kennet, Cowp. 434, a different doctrine was held in Jackson v. Town, 4 Cow. 599, and by Judge Spencer in Verplanck v. Sterry, 12 Johns., 556, 557, though perhaps not decided in the case. In this case Judge Spencer said: "If the grantor be not indebted to such a degree as that the settlement will deprive the creditors of an ample fund for the payment of their debts, the consideration of natural love and affection will support the deed, although a voluntary one, against his creditors; for, in the language of the decisions, it is free from the imputation of fraud. In Jackson v. Seward, 8 Cow., 406, it was held by the Court of Errors that a conveyance or settlement, in consideration of blood and natural affection, though by one indebted at the time, was *prima facie* only, and not conclusively fraudulent. Subsequently, by section 4, of title 3, chapter 7, part 2, of the Revised Statutes, 2 R. S., 137, it was declared that the question of fraudulent intent, in all cases arising under the provisions of that chapter, should be deemed a question of fact; and that no conveyance or charge should be adjudged fraudulent as against purchasers or creditors, solely on the ground that it was not founded on a valuable consideration. The question in this case arises under the provisions of this chapter of the Revised Statutes, which treats "of fraudulent conveyances and contracts, relative to goods and chattels and things in action." No decision or series of decisions, then, can make the question of fraud in this case a question of law, or establish that there is a legal presumption of fraud from the facts and circumstances found by the referee; for the

With respect to the claims of subsequent creditors, there is more difficulty in arriving at the conclusion, and I am not called upon in this case to give any definite opinion, for there are no such creditors before the court. But since the subject has been examined, I would suggest what appears to me, at present, but with my mind still open for further discussion and consideration, to be the better opinion from the cases; it is, that the presumption of fraud as to these creditors, arising from the circumstance that the party was indebted at the time, is repelled by the fact of these debts being secured by mortgage, or by a provision in the settlement; that if no such circumstance exists, they are entitled to impeach the settlement by a bill properly adapted to their purpose, and charging, and proving indebtedness at the time, so that their rights will not depend on the mere pleasure of the prior creditors, whether they will or will not impeach the settlement; that the question then arises, to what extent must the subsequent creditors show a prior indebtedness? Must they follow the dictum of Lord Alvanley, and show insolvency, or will it be sufficient to show any prior debt, however small, as is contended for by Mr. Atherley, with his usual ability, in his *Treatise on Marriage Settlements*? *Ath. Mar. Set.*, p. 212 to 219. I should apprehend that the subsequent creditors would be required to go so far, and only so far, in showing debts as would be sufficient to raise reasonable evidence of a fraudulent intent. To show any existing debt, however trifling and inevitable (to which every person is, more or less, subject), would not surely support a presumption of fraud in fact; no voluntary settlement in any possible case could stand upon that construction. I should rather conclude, that the fraud in the voluntary settlement was an inference of law, and ought to be so, as far as it concerned existing debts; but that as to subsequent debts, there is no such necessary legal presumption, and there must be proof of fraud in fact; and the indebtedness at the time, though not amounting to insolvency, must be such as to warrant that conclusion. It appears, in all the cases (and particularly in the decision of Sir Thomas Plumer since the publication of M. Atherley's treatise), that a marked distinction does exist, under the statute of 13 Eliz., between prior and subsequent creditors, in respect to these voluntary settlements; and it is now settled that the settlement is not void, as of course, against the latter, when there were no prior debts at the time.

The law in Massachusetts seems to be laid down according to this view of the subject.

In *Bennett v. Bedford Bank*, 11 Tyng, 421, there was a voluntary conveyance to a son by a father, indebted at the time, but not in embarrassed circumstances, or equal in debt to the value of his property. The debt to the plaintiff did not accrue until several years afterwards. It was held by the court, that as there was no fraud in fact, the deed

statute declares that the question of fraud shall be deemed a question of fact, and by declaring it to be a question of fact, in effect declares that there is no such legal presumption."

in this case was good against the subsequent creditor, "and against all persons but such as were creditors at the time."

But there is a case, recently decided by the Supreme Court of Errors of Connecticut, *Salmon v. Bennett*, 1 Day's Conn. Rep. N. S. p. 525, which lays down a rule somewhat different from that which I have deduced from the English cases.

The question arose in an action of ejectment. The plaintiff had purchased Virginia lands of Sherwood, in 1794, and paid him the purchase money. In 1809, by a decree in Chancery, the sale was annulled, on the ground of fraud, and the purchase-money decreed to be refunded, on condition that the plaintiff executed a release. This was done, and he afterwards, in 1814, levied an execution founded on that decree, on lands which Sherwood owned in 1794, but which he had conveyed to his son in 1798, in consideration of natural affection only, and which lands the son had, in 1802, conveyed to the defendant, with knowledge of the deed to the son. It was proved, that when Sherwood executed the deed of gift, he was not indebted to any person, except to the plaintiff, in the manner stated, and that the lands conveyed did not contain more than one-eighth part of his real estate. But it was admitted, that long before the levy of the execution he had conveyed all his real estate, and was, at that time, destitute of property.

One question was, whether the deed to the son, being voluntary, was not fraudulent as against the plaintiff; and as the opinion of the court was on this point, I need not notice any other. It was also made a question, at the bar, whether the plaintiff was to be deemed an existing creditor at the time of the deed to the son; but as the court assumed the fact of an existing indebtedness at the time of the conveyance, I need not notice that point.

The judgment of the court was in favor of the defendant, and the opinion of eight of the judges, as delivered by the Chief Justice, was, that a distinction existed in the case of a voluntary conveyance, between the children of the grantor and strangers, and that mere indebtedness at the time, will not, in all cases, render a voluntary conveyance void as to creditors, where it is a provision for a child; that an actual or express intent to defraud need not be proved, for this would be impracticable in many instances where the conveyance ought not to be established, and it may be collected from the circumstances of the case; that if there be no fraudulent intent, and the grantor be in prosperous circumstances, unembarrassed, and not considerably indebted, and the gift a reasonable provision for the child, leaving ample funds unincumbered, for the payment of the grantor's debts, the voluntary conveyance to the child will be valid against existing creditors. But if the grantor be considerably indebted and embarrassed, and on the eve of bankruptcy, or if the gift be unreasonable, disproportioned to his property, and leaving a scanty provision for his debts, the conveyance will be void, though there be no fraudulent intent. And it was concluded, that under the circumstances of that case, the indebtedness of

the grantor at the time, to the plaintiff, was not sufficient to affect the conveyance to his son.

The court do not refer to authorities in support of their opinion, and perhaps they may have intended not to follow, strictly, the decisions at Westminster Hall, under the statute of 13 Eliz. I can only say that, according to my imperfect view of those decisions (and by which I consider myself governed), this case was not decided in conformity to them; but I make this observation with great deference to that court. There may be loose sayings, and mere notes of cases, from which nothing very certain or intelligible can be deduced; but I have not been able to find the case in which a mere voluntary conveyance to a wife or child has been plainly and directly held good against a creditor existing at the time. The cases appear to me to be upon that point uniformly in favor of the creditor. The Vice-Chancellor, in *Holloway v. Millard*, says, in so many words, that "a voluntary disposition, even in favor of a child, is not good, if the party is indebted at the time." The cases of *St. Amand v. Barbara*, *Fitzer v. Fitzer*, *Taylor v. Jones*, and, indeed, the general language throughout the cases, seem to me to establish this point. So, Lord Hardwicke observed, in *Lord Townshend v. Windham*, that "he knew of no case on the 13th Eliz. where a man, indebted at the time, makes a mere voluntary conveyance to a child, without consideration, and dies indebted, but that it shall be considered as part of his estate for the benefit of his creditors." In a preceding part of the same page he said expressly, there was "no such case," unless the conveyance was "in consideration of marriage, or other valuable consideration;" and he draws the distinction between prior and subsequent creditors, in saying, that if the voluntary conveyance of real estate, or a chattel interest, was by one not indebted at the time, and was for a child, and no particular evidence or badge of fraud as against subsequent creditors, it would be good. The decision in that case was, that a general power of appointment given over an estate, in lieu of a present interest in it, having been executed voluntarily, though for a daughter, was to be deemed assets in favor of creditors.

If the question rests not upon an actual fraudulent intent (as is admitted in all the cases), it must be a case of fraud in law, arising from the fact of a voluntary disposition of property, while indebted; and the inference founded on that fact cannot depend on the particular circumstances, or greater or less degree of pecuniary embarrassment of the party. These are matters for consideration, when we are seeking, as in the case of subsequent creditors, for actual fraud. I apprehend it is, upon the whole, better and safer not to allow a party to yield to temptation, or natural impulse, by giving him the power of placing property in his family beyond the reach of existing creditors. He must be taught, by the doctrines of the court, that the claims of justice are prior to those of affection. The inclination of my mind is strongly in favor of the policy and wisdom of the rule, which absolutely disables a

man from preferring, by any arrangement whatever, and with whatever intention, by gifts of his property, his children to his creditors. Though hard cases may arise in which we should wish the rule to be otherwise, yet, as a permanent regulation, more good will ensue to families, and to the public at large, by a strict adherence to the rule, than by rendering it subservient to circumstances, or by making it to depend upon a fraudulent intent, which is so difficult to ascertain, and frequently so painful to infer.

The effect of these donations, by a debtor, *inter vivos*, is much discussed by Voet, in his Commentaries on the Digest, lib. 39, tit. 5. De Donationibus, s. 20; and he concludes, that the property in the hands of the donee is chargeable with the existing debts of the donor. “Ex eo autem, quod donatur competentia gaudens beneficio deducit primo æs alienum, facilis est decisio quæstionis, utrum donatis omnibus bonis, aut majore eorum parte, donatarius ad æs alienum donantis solvendum obligatus sit? — Æquum haud foret, ex liberalitate, defuncti creditores ejus, donatione antiquiores (nam qui postea demum crediderunt, ex donatione præcedente jam perfecta videri nequeunt fraudati esse) credito suo defraudari, satiusque visum, donata revocari per actionem Paulianam, etiam a donatario in bona fide posito ac fraudis haud particeps. Dum melior esse debuit conditio creditorum de damno evitando agentium, quam donatarii agentis de lucro captando. — Secundum hodierni juris simplicitatem donatarium a creditoribus donatoris recta via absque circuitu ad solvendum æs alienum donantis compelli posse, post multos alios citatos tradit. Grænewegen, ad l. 28, ff. h. t.”

This learned civilian makes the same distinction that our laws does, between debts existing at the time and debts created subsequent to the gift.

The same doctrine, on this subject, in all essential respects, is adopted in France. The gift of specific articles does not charge the donee with the debts of the donor, unless the latter knew, or ought to have known, that he was not solvent at the time; in which case the gift is held to be fraudulent. But in other more general dispositions of the whole, or part, of his estate, the property in the hands of the donee is subject to the existing, though not to the future, debts, to the value of the gift. (*Traité des Donat. entre vifs*, sect. 3, art. 1, § 2. *Œuvres posth. de Pothier*, tom. 6.)

The question does not arise in this case as to what extent these voluntary dispositions of property can be reached. Here the land itself exists in the hands of the trustee for the wife; and we have no concern, at present, with the question how far gifts of chattels, of money, of choses in action, of corporate, of public stock, or of property alienated to a *bona fide* purchaser, can be affected. The debt in the present case was large, and the disposition extravagant, being of the greater part of the real estate, and we have no evidence of sufficient property left unincumbered. Even if we were to enter into the particular circumstances of the case, I should have no doubt of the justice of the creditor's claim.

I shall, accordingly, decree, that a reference be had to ascertain the balance of principal and interest due to the plaintiff, and that so much of the lands, included in the conveyance to Gilbert Aspinwall, as the Master shall judge sufficient to satisfy that amount, with costs, be sold; and that the said G. A. be directed to join in the conveyance, &c.

Decree accordingly.

FREEMAN v. POPE.

CHANCERY, JUNE 7, 1870.

[*Reported in Law Reports, 5 Chancery Appeals, 538.*]

THIS was an appeal by the defendant Pope from a decree of Vice-Chancellor JAMES, setting aside a voluntary settlement, dated the 3d of March, 1863, by which the Rev. J. Custance assigned to trustees for the benefit of Julia Pope (then Julia Thrift) a policy of insurance for £1000 (effected by him in 1845 on his own life), and covenanted to pay the premiums. It appeared that he had previously settled this policy upon her in 1853, reserving a power of revocation, which he exercised in 1861, in order that he might receive a bonus.

At the time when the settlement now impeached was made, the settlor held two livings producing a net income of £315, and he was entitled to a Government life-annuity of a little more than £180, and to a copyhold cottage which he on the same day covenanted to surrender to Mrs. Walpole, the mother of Julia Pope, for £50. He had no other property except his furniture, and he was being pressed by his creditors. Among other debts, he owed £489 to Messrs. Gurney, his bankers at Norwich, and £7 8s. 6d. to a postmaster. On the same 3d of March, 1863, he borrowed from Mrs. Walpole £350, for which he gave her a bill of sale of his furniture. Mrs. Walpole was privy to, and one of the trustees of, the settlement. At the same time he made an arrangement with his bankers that his solicitor, Mr. Copeman, should receive certain income from the benefices, and pay out of it £50 each half-year towards discharge of the balance. The banking account at Norwich was to remain a dead account, and to be discharged, with interest, by the above instalments. A new account was to be opened with the Aylsham branch of the same bank, and Copeman was to pay the residue of the income (after deducting the £50) to this new account, which was to be an ordinary current banking account.

At the testator's death, in April, 1868, the balance of £489 due to the bankers had been reduced to £117 by means of the annual instalments of £50. The Aylsham account showed no balance on either side. The postmaster's debt of £7 8s. 6d., and Mrs. Walpole's £350, with an arrear of interest, remained unpaid. The other debts due at the date of the settlement had been paid. The settlor, however, owed many

debts subsequently contracted, and there were no assets whatever to pay them; the furniture having been sold under a subsequent bill of sale, to which Mrs. Walpole had agreed to postpone her security.

The plaintiff, a tradesman who had supplied goods to the settlor after the date of the settlement, filed his bill for administration of the settlor's estate, and to set aside the settlement, to the benefit of which the defendant Pope had become entitled under an appointment by Julia Pope.

Vice-Chancellor JAMES made a decree for setting aside the settlement, from which Pope appealed.

Mr. Morgan, Q. C., and *Mr. H. A. Giffard*, for the appellant.

Mr. Kay, Q. C., and *Mr. Cozen-Hardy*, for the plaintiff, were not called upon.

LORD HATHERLEY, L. C. The principle on which the statute of 13 Eliz. c. 5 proceeds is this, That persons must be just before they are generous, and that debts must be paid before gifts can be made.

The difficulty the Vice-Chancellor seems to have felt in this case was, that if he, as a special jurymen, had been asked whether there was actually any intention on the part of the settlor in this case to defeat, hinder, or delay his creditors, he should have come to the conclusion that he had no such intention. With great deference to the view of the Vice-Chancellor, and with all the respect which I most unfeignedly entertain for his judgment, it appears to me that this does not put the question exactly on the right ground; for it would never be left to a special jury to find, *simpliciter*, whether the settlor intended to defeat, hinder, or delay his creditors, without a direction from the judge that if the necessary effect of the instrument was to defeat, hinder, or delay the creditors, that necessary effect was to be considered as evidencing an intention to do so. A jury would undoubtedly be so directed, lest they should fall into the error of speculating as to what was actually passing in the mind of the settlor, which can hardly ever be satisfactorily ascertained, instead of judging of his intention by the necessary consequences of his act, which consequences can always be estimated from the facts of the case. Of course there may be cases — of which *Spirett v. Willows*, 3 D. J. & S. 293, is an instance — in which there is direct and positive evidence of an intention to defraud, independently of the consequences which may have followed, or which might have been expected to follow, from the act. In *Spirett v. Willows* the settlor, being solvent at the time, but having contracted a considerable debt, which would fall due in the course of a few weeks, made a voluntary settlement by which he withdrew a large portion of his property from the payment of debts, after which he collected the rest of his assets and (apparently in the most reckless and profligate manner) spent them, thus depriving the expectant creditor of the means of being paid. In that case there was clear and plain evidence of an actual intention to defeat creditors. But it is established by the authorities that, in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the pay-

ment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute.

The circumstances of the present case are these: The settlor was pressed by his creditors on the 3d of March, 1863. He was a clergyman with a very good income, but a life income only. He had a life annuity of between £180 and £190 a year, and besides that he had an income from his benefice — his income from the two sources amounting to about £1000 a year. But at the same time his creditors were pressing him, and he had to borrow from Mrs. Walpole, who lived with him as his housekeeper, a sum of £350 wherewith to pay the pressing creditors. That accordingly was done, and he handed over to her as security the only property he had in the world beyond his life income and the policy which is now in question, namely, his furniture, and a copyhold of trifling value. It is said, however, that the value of the furniture exceeded (and I will take it to be so) by about £200 the value of the debt which was secured to Mrs. Walpole. That debt may be put out of consideration, not only on that account, but because Mrs. Walpole, being herself a trustee of the settlement which is impeached, cannot be heard to complain of that settlement. But he also owed at the time of this pressure a debt of £339 to his bankers at Norwich, and he required, for the purpose of clearing the pressing demands upon him, not only the sum which he borrowed from Mrs. Walpole, but an additional sum of £150, which sum the bankers agreed to furnish, making their debt altogether, at the date of the execution of this settlement, a debt of £489. They made with him an arrangement (which probably was intended, in a great measure, as a friendly act towards a gentleman who was seventy-three years of age, and the duration of whose life, therefore, could not be expected to be very long), that they would for the present (for it cannot be held to be more than a present arrangement) suspend the proceedings, which, it appears, they were contemplating, upon his allowing his solicitor to receive part of his income, pay £100 a year towards liquidating the £489 (which was to be carried to what is called a "dead account"), and pay the residue into their branch bank at Aylsham, to an account upon which the settlor might draw. That arrangement was made, but there was no bargain on the part of the bankers that they would not sue at any time they thought fit; and, on the other hand, they had nothing in the shape of security for the payment of their debt, for they had not taken out sequestration, and there could be nothing in the shape of a charge upon the living except through the medium of a sequestration. When the settlor had made the voluntary assignment of the policy, he stood in this position, that he had literally nothing wherewithal to pay or to give security for the debt of £489, except the surplus value of the

furniture, which must be taken to be worth about £200, and he was clearly and completely insolvent the moment he had executed the settlement, even if we assume that some portion of his tithes and of the annuity was due to him. It appears that a payment of the tithes was made in January, and we cannot suppose that there was more owing to him than the £200 which was paid in May, two months after the date of the deed; and if we add to that £200 as the surplus value of the furniture, and add something for an apportioned part of the annuity, the whole put together would not meet the £489. He, in truth, was at that time insolvent; and there I put it more favorably than I ought to put it, because he could not at once put his hands upon that sum, so as to apply it towards satisfying the debt, at any time between March and May. The case, therefore, is one of those where an intention to delay creditors is to be assumed from the act.

The Vice-Chancellor seems to have felt himself very much pressed by the case of *Spirett v. Willows*, 3 D. J. & S. 293, 302, and the dicta of Lord Westbury in that case. The first of those dicta is: "If the debt of the creditor by whom the voluntary settlement is impeached existed at the date of the settlement, and it is shown that the remedy of the creditor is defeated or delayed by the existence of the settlement, it is immaterial whether the debtor was or was not solvent after making the settlement."¹ The Vice-Chancellor seems to have thought himself bound by this expression of opinion, and to have set aside the settlement upon that ground alone. It is clear, however, that this expression of opinion on the part of the Lord Chancellor was by no means necessary for the decision of the case before him, where the settlor was

¹ This dictum of Lord Westbury, though supported by early English cases, is inconsistent with the language or decision in many recent cases. *Richardson v. Smallwood*, Jac. 552; *Shears v. Rogers*, 3 B. & Ad. 362; *Townsend v. Westacott*, 2 Beav. 340; *Jackson v. Bowley*, Car. & M. 97; *Skarf v. Soulby*, 1 Mac. & G. 364; *Holmes v. Penney*, 3 K. & J. 90; *Turnley v. Hooper*, 3 Sm. & G. 349; *French v. French*, 6 De G. M. & G. 95, 101; *Martyn v. McNamara*, 4 D. & War. (Ir.) 411, 427; *Manders v. Manders*, 4 Ir. Eq. 434.

And in most States in this country the existence of indebtedness, unless beyond what is reasonable with reference to the settlor's remaining property, is no evidence of fraud. *Warren v. Moody*, 122 U. S. 132; *Adams v. Collier*, 122 U. S. 382; *Chambers v. Sallie*, 29 Ark. 407; *Windhams v. Bootz*, 92 Cal. 617; *Woolridge v. Boardman*, 115 Cal. 74; *Salmon v. Bennett*, 1 Conn. 525; *Trumbull v. Hewitt*, 62 Conn. 448, 451; Ga. Code, § 2695; *Cohen v. Parish*, 105 Ga. 339; *Harting v. Jockers*, 136 Ill. 627; *Dillman v. Nadelhoffer*, 162 Ill. 625; *Emerson v. Opp*, 139 Ind. 27; *Gwyer v. Figgins*, 37 Ia. 517; *Tyler v. Budd*, 96 Ia. 33; *Weeks v. Hill*, 88 Me. 111; *Gardiner Savings Inst. v. Emerson*, 91 Me. 535; *Warner v. Dove*, 33 Md. 579; *Winchester v. Charter*, 102 Mass. 272; *Clark v. McMahon*, 170 Mass. 91; *Blake v. Boisjoli*, 51 Minn. 296; *Wilson v. Kohlheim*, 46 Miss. 346; *Hoffman v. Nolte*, 127 Mo. 120; *Glacier v. Walker*, 69 Mo. App. 288; *Pomeroy v. Bailey*, 43 N. H. 118; *Kain v. Larkin*, 131 N. Y. 300, 141 N. Y. 144; N. C. Code § 1547; *Clement v. Cozart*, 112 N. C. 412; *Hamburger v. Grant*, 8 Oreg. 181; *Crumbaugh v. Kugler*, 2 Ohio St. 373; *Dukes v. Spangler*, 35 Ohio St. 119; *Wilson v. Howser*, 12 Pa. 109; *Clark v. Depew*, 25 Pa. 509; *Burkey v. Self*, 4 Sneed, 121; *Nelson v. Kinney*, 93 Tenn. 428; *Panhandle Nat. Bank v. Foster*, 74 Tex. 514; *Carkeek v. Boston Nat. Bank*, 16 Wash. 399; *Second Nat. Bank v. Merrill*, 81 Wis. 142.

guilty of a plain and manifest fraud. It is expressed in very large terms, probably too large; but, at all events, it is unnecessary to resort to it in the present case. It seems to me that the difficulty felt by the Vice-Chancellor arose from his thinking that it was necessary to prove an actual intention to delay creditors, where the facts are such as to show that the necessary consequence of what was done was to delay them. If we had to decide the question of actual intention, probably we might conclude that the settlor, when he made the settlement, was not thinking about his creditors at all, but was only thinking of the lady whom he wished to benefit; and that his whole mind being given up to considerations of generosity and kindness towards her, he forgot that his creditors had higher claims upon him, and he provided for her without providing for them. It makes no difference that Messrs. Gurney, the bankers, seem to have been willing to forego the immediate payment of their debt; the question is, whether they could not within a month or less after the execution of the settlement, if they had been so minded, have called in the debt and overturned the settlement? Beyond all doubt they could, on the ground that it did not leave sufficient property to pay their debt; and this being so, we are not to speculate about what was actually passing in his mind. I am quite willing to believe that he had no deliberate intention of depriving his creditors of a fund to which they were entitled, but he did an act which, in point of fact, withdrew that fund from them, and dealt with it by way of bounty. That being so, I come to the conclusion that the decree of the learned Vice-Chancellor is right.¹

EX PARTE MERCER. IN RE WISE.

COURT OF APPEAL, MARCH 1-APRIL 16, 1886.

[Reported in 17 Queen's Bench Division, 290.]

APPEAL from an order of the Judge of the Croydon County Court, by which it was declared that a post-nuptial settlement executed by H. J. J. Wise, a bankrupt, was fraudulent and void as against the trustee in the bankruptcy, and the trustee of the settlement was ordered to deliver it up to be cancelled.

The bankrupt was a master mariner. In the year 1881 he was engaged to be married to Miss Emily Agnes Vyse, but being at Hong Kong in the course of a voyage, he, on the 31st of May, 1881, married another lady. On the 25th of August, 1881, Miss Vyse commenced an action for breach of promise against him in the Queen's Bench Division, and on the 8th of October, 1881, he was served with the

¹ A portion of Lord HATHERLEY's opinion relating to costs, and a concurring opinion of Sir G. M. GIFFORD, L. J., are omitted.

writ at Hong Kong. He was under the will of his stepfather entitled to a legacy of £500, subject to a life interest given to his mother. His mother died on the 11th of May, 1881, and thereupon the legacy vested in the bankrupt in possession. The money was in the hands of W. P. Brown, the executor of the will. On the 17th of October, 1881, the bankrupt executed at Hong Kong, where he then was, a voluntary settlement of this legacy, whereby he assigned the legacy to Brown, on trust to invest the same, and to pay the income thereof, during the joint lives of Wise and his wife, to the wife for her separate use without power of anticipation, and, after the death of such one of Wise and his wife as should first die, to pay the income to the survivor during his or her life, and after the death of the survivor, Brown was to stand possessed of the trust fund in trust for the children of the marriage as therein mentioned, and, in default of children, in trust for Wise absolutely. On the 20th of July, 1882, Miss Vyse obtained judgment in the breach of promise action for £500 damages and costs. On the 14th of November, 1884, Wise was adjudicated a bankrupt.

The bankrupt made an affidavit in the county court, in which he stated that at the time of the execution of the settlement he was perfectly solvent and able to pay his debts without the aid of the property comprised in the settlement.

After the order had been made by the county court judge, the bankrupt made a further affidavit, and an affidavit was made by Brown, and these affidavits were used on the hearing of the appeal by the Divisional Court. The bankrupt in his further affidavit said that he was not aware that he was entitled to the legacy until he received at Hong Kong between the 12th and 16th of October, 1881, a letter from Brown informing him of it. When he married he was not aware that he had any property to settle. Immediately he received notice of the legacy being due to him, he instructed some solicitors at Hong Kong to prepare the settlement. He said that the writ which had been served on him in the breach of promise action had no influence in inducing him to make the settlement, as he considered the writ was merely a threat, and that he should hear nothing more about the action. When he received the intimation of the legacy he told his wife that he should settle it on her, as it was the only money she would have in case of his death. She did not suggest to, or request, or influence him in any way in making the settlement, but it was made solely as a provision for his wife or any children they might have in case of his death, and, had he known before his marriage that he was entitled to the legacy, he should certainly have settled it before his marriage. He was not cross-examined on this affidavit.

Mrs. Wise and Brown appealed from the order of the county court.

The Divisional Court sustained the appeal; and the trustee in bankruptcy appealed.

W. H. Lynden Bell (*Morgan Howard*, Q. C., with him), for the appellant.

H. D. Greene, Q. C., and F. Cooper Willis, for Mrs. Wise and the trustees of the settlement, were not heard.

LORD ESHER, M. R. I think the decision of the Divisional Court was right.

The argument was first put in this way: It is necessary to prove that the bankrupt, at the date of the voluntary settlement, intended to defeat and delay a creditor or his creditors generally; the necessary consequence of what he did was to defeat and delay his creditors; and therefore, as a proposition of law, the tribunal which had to consider whether he did intend to defeat and delay his creditors was bound to find that he did. In support of that proposition dicta of great and eminent judges were cited. I will venture to say as strongly as I can that to mind that proposition is monstrous. It is said that it is a necessary inference that a man intends the natural and necessary result of his acts. If you want to find out the intention in a man's mind, of course you cannot look into his mind, but, if circumstances are proved from which you believe that he had a particular intention, you infer as a matter of fact that he had that intention. No doubt, in coming to a particular conclusion as to the intention in a man's mind, you should take into account the necessary result of the acts which he has done. I do not use the words "necessary result" metaphysically, but in their ordinary business sense, and of course, if there was nothing to the contrary, you would come to the conclusion that the man did intend the necessary result of his acts. But, if other circumstances make you believe that the man did not intend to do that which you are asked to find that he did intend, to say that, because that was the necessary result of what he did, you must find, contrary to the other evidence, that he did actually intend to do it, is to ask one to find that to be a fact which one really believes to be untrue in fact. Whether the fact that the necessary effect of a voluntary deed is to defeat or delay the creditors of the grantor will make the deed void under the statute of Elizabeth, although there was no such intent in his mind at the time when he executed it, is a question which we are not now called upon to decide. But that is a question wholly independent of the question of intention. That may be the law; the courts may have put that construction on the statute. But that is a different proposition from that which was put forward in argument, and I will not undertake to decide it now. It must be recollected that the statute of Elizabeth applies, and may make a deed void, even though the grantor never becomes a bankrupt. But this case was at first argued, not upon that footing, but upon the assumption that, if the natural or necessary effect of what the settlor did was to defeat or delay his creditors, the court must find that he actually had that intent. That proposition or doctrine I entirely abjure.

We must look at all the facts of this case. The bankrupt was a captain of a merchant ship, and there is no evidence whether his employment ceased at the end of every voyage, or whether it was a

constant employment. He had promised to marry Miss Vyse. Then he went to Hong Kong, and there he married another lady, and so laid himself open to an action for breach of promise of marriage by Miss Vyse. That action having been brought, might, so far as any one could foretell, have resulted in a verdict either for 1s. or for £500 damages; no one could tell what the result would be. Well, he married the lady in Hong Kong in May, and in October there came out to him, by the same post from England, the information that he had become entitled to a legacy of £500, and also the information that Miss Vyse had brought an action against him for breach of promise of marriage. This was the first time that he had had any intimation of the fact that he had any realized fortune, and he immediately settled the £500 upon his wife and children.

Now, what was his position at that time? According to his evidence, which is not disputed (for he has not been cross-examined on his affidavit), he did not owe a shilling in the world. There is no evidence that he had not money owing to him for wages, and in all probability he had, because, if his voyage did not terminate at Hong Kong (and there is no evidence that it did), if he had got to take his ship home to England, in all probability his wages were not payable until the end of the voyage. If so, he would have means to that extent and he did not owe a shilling. F

Now with regard to the action, how could any one—how could his legal adviser—have told him what the amount of the verdict was likely to be? If the verdict had been for £50, and he had had £50 coming to him at the end of his voyage, he would have been able to pay it, and on another occasion he would have been able to pay the costs. It was entirely a matter of speculation what the amount of the verdict would be. Therefore he was not insolvent; it was not the necessary consequence of what he did to defeat or delay the plaintiff in the action, for, if the verdict had been for a small amount, she would not necessarily have been delayed for a week. D

In order to make this deed void under the statute of Elizabeth (however far that statute may be stretched), we are bound in the present case to find that there was an actual intent in the bankrupt's mind to defeat or delay his creditors, and there is no evidence of such an intent. He has sworn that he was not thinking of his creditors. The only creditor that it is suggested he had to think about was Miss Vyse, and no one could tell what the verdict in her action would be. But what happened afterwards? It is obvious that, when the action came on for trial, evidence must have been given about this £500 legacy to which the defendant was entitled, and the jury took the vindictive view of the plaintiff, and gave her as damages the whole of the defendant's realized property. It was a startling verdict, which I certainly should not have anticipated, and I do not see why he was bound to anticipate it. When you have got those facts, and you are asked to conclude that the bankrupt actually intended to defeat Miss

Vyse's claim, it seems to me that the Divisional Court were perfectly justified in declining to find that he had any such intent. Upon the facts, I cannot find that there was such an intent.

The appeal must be dismissed.

LINDLEY, L. J. The evidence before the county court judge differed materially from that which was before the Divisional Court, and I am not surprised at the view which he took of the case. Unexplained, the circumstances had a very suspicious appearance. But the affidavits which have been filed since the hearing in the county court give a totally different complexion to the transaction, and it was upon those affidavits that the Divisional Court took the view contrary to that which had been taken by the county court judge. Now we have all the facts before us, and we must apply the law to those facts. There is a voluntary settlement made by a man who had not a farthing of debts, but against whom an action had been commenced for breach of promise of marriage. At the time when he made the settlement a sum of £500 had just accrued to him, and he settled it upon his wife and children. He tells us, and the Divisional Court believed him, and I also believe that he was speaking the truth, that he thought the action for breach of promise would come to nothing. At all events, the result of it was in the highest degree speculative; he was not then indebted to the plaintiff, but she had made a claim against him which might or might not result in damages. We have, therefore, to deal with the case of an honest man, not in fact indebted at all, and the question is, whether we are driven (not by the statute of Elizabeth, but by a series of decisions upon it) to say that the settlement cannot stand. I do not think we are. It is true that voluntary settlements have been set aside under the statute, as it has been construed for a great number of years, in cases in which there was no actual intention to defraud. It has been held to be sufficient if, when the settlement is executed, the circumstances are such that it must have that effect. But the language which has been used in a great many cases, that a man must in point of law be held to have intended the necessary consequences of his own acts, is apt to mislead, by confusing the boundary between law and fact, and by consequences which can be foreseen with those which cannot. But although I am not prepared to say that a voluntary settlement can never be set aside under the statute of Elizabeth, as it has been construed, unless there has been in fact an intention to defraud, I am not aware of any decision which goes the length of upsetting the present deed under the circumstances with which we have to deal. In this case there was no intention to defeat the plaintiff, and, when the settlement was executed, the probability of the plaintiff obtaining substantial damages was very slight. The case is certainly not within the language of the statute. I have no doubt that the view taken by the Divisional Court was right.

I should add that I have looked at § 47 of the Bankruptcy Act, 1883, and it is quite clear that it does not apply.

LOPES, L. J. We need only consider the law so far as it applies to the facts of the present case. It has been argued that, if the necessary effect of a voluntary settlement is to defeat or hinder creditors, the court is bound to infer such an intent, whether it did or did not in fact exist. I will express no opinion upon that matter, because it is not necessary for the purpose of deciding the present case. It cannot, according to my view, be said that it was the necessary consequence of this voluntary settlement to defeat or hinder the settlor's creditors. The only suggested creditor is Miss Vyse. There are many reasons why it was not a necessary consequence of the settlement that her claim should be defeated. The action might have failed for various reasons; the plaintiff might not have been willing to pursue it; it might have resulted in a verdict for the defendant, or in a verdict for the plaintiff with very small damages. There are many other ways in which the action might have terminated, without its resulting in a verdict for £500. It seems to me, therefore, that it cannot be said that the necessary effect of the settlement was to defeat or hinder Miss Vyse.

What, then, is the question in this case? The question which I should have left to the jury is this: Whether, having regard to all the circumstances, the settlor intended to defeat or hinder his creditors? That is a question of fact which can only be determined by the evidence. Before the county court judge there was only one affidavit, and he came to a conclusion at which I am not at all surprised. Before the Divisional Court there were several other affidavits, and they arrived at a different conclusion, with which I entirely agree. I adopt the words of CAVE, J., when he says, "Looking at the facts which are established by the affidavits, it appears to me reasonably clear that the settlor had no intention whatever of defrauding his creditors, and that he had not got Miss Vyse and her claim in his mind when he made the settlement." I entirely agree with that conclusion, and I think the decision of the Divisional Court was right.¹

¹ A person having an unliquidated claim is a creditor within the statute of Elizabeth.

Breach of promise to marry. *Beam v. Bennett*, 51 Mich. 148; *McVeigh v. Ritenour*, 40 Ohio St. 107; *Shoutz v. Brown*, 27 Pa. 123; *Hoffman v. Junk*, 51 Wis. 613.

Alimony and separate support. *Blenkinsopp v. Blenkinsopp*, 1 De G. M. & G. 495; *Hinds v. Hinds*, 80 Ala. 225; *Tyler v. Tyler*, 126 Ill. 525; *Pickett v. Garrison*, 76 Ia. 347; *Livermore v. Bontelle*, 11 Gray, 267; *Chase v. Chase*, 105 Mass. 385; *Fiske v. Fiske*, 173 Mass. 413, 417; *Morrison v. Morrison*, 49 N. H. 69; *Green v. Adams*, 59 Vt. 602. See also *Plunkett v. Plunkett*, 114 Ind. 484; *Brownell v. Briggs*, 173 Mass. 529; *Verner v. Verner*, 64 Miss. 184.

Right of action for tort. *Barling v. Bishopp*, 29 Beav. 417; *Crossley v. Elworthy*, L. R. 12 Eq. 158; *Westmoreland v. Powell*, 59 Ga. 256; *Bongard v. Block*, 81 Ill. 186; *Anglo-American Co. v. Baier*, 31 Ill. App. 653; *Hunsinger v. Hofer*, 110 Ind. 390; *Petree v. Brotherton*, 133 Ind. 692; *Carbiener v. Montgomery*, 97 Ia. 659; *Schuster v. Stout*, 30 Kan. 529; *Tobie Mfg. Co. v. Waldron*, 75 Me. 472; *Welde v. Scotten*, 59 Md. 72; *Clapp v. Leatherbee*, 18 Pick. 131; *Schaible v. Ardner*, 98 Mich. 70; *Post v. Stiger*, 39 N. J. Eq. 554; *Thorpe v. Leibrecht*, 56 N. J. Eq. 499; *Munson*

v. Genesee Works, 37 N. Y. App. Div. 205; *McKenna v. Crowley*, 16 R. I. 364; *Farnsworth v. Bell*, 5 Sneed, 531; *Cole v. Terrell*, 71 Tex. 549; *Harris v. Harris's Ex.* 23 Gratt, 737, 764. See also *Leonard v. Bolton*, 153 Mass. 428; *Pierstoff v. Borges*, 86 Wis. 128. Contrary decisions are *Fox v. Hills*, 1 Conn. 294, 299; *Fowler v. Frisbie*, 3 Conn. 320; *Hill v. Bowman*, 35 Mich. 191 (overruled by *Schaible v. Ardner*, 98 Mich. 70); *Evans v. Lewis*, 30 Ohio St. 11; *White v. Gates*, 42 Ohio St. 109, 112; *Green v. Adams*, 59 Vt. 602, 611. In *Sanders v. Logue*, 88 Tenn. 355, 360, the court say:—

"It appears from this statement of facts, that Sanders neither had any recovery for the fraud alleged to have been committed in taking his money upon false representation as to title, nor did he have any action pending therefor when these conveyances were made; but that, instead, he was the judgment debtor of Logue in a decree in nowise complained of. But he insists that, inasmuch as he had a right of action for the money received of him in consequence of the fraudulent representations of Logue, his was an existing demand at the time, and such a one as must be considered in determining the validity of the conveyances. It is, of course, true that a conveyance of property to defeat an expected recovery in an action of tort already commenced is fraudulent in fact and void. Bell v. Farnsworth, 5 Sneed, 531, 532; Patrick v. Ford, 5 Sneed, 531, 532.

"And we may add that we think it equally clear that a voluntary conveyance pending an action of tort, whether actually intended to defeat it or not, would be void, if upon estimating the amount of property retained, there was a deficiency to pay the amount claimed. It may be true, also, that a conveyance for the fraudulent purpose of defeating a recovery in an action of tort anticipated would be void. But, as we have said, we are not now dealing with any question of actual fraud. We are discussing the question whether a deed made in good faith, in the absence of any debt known or asserted, makes a deed fraudulent in law, and we have no hesitation in holding that it does not.

"In the case we are now considering, whether we treat the complainant as repudiating his contract because he was fraudulently induced to make it, and suing for the money as for money had and received to his use, or whether we treat the action as one for damages incurred in consequence of the fraud and deceit practised upon him, measured by the money paid and interest, the result is the same. In the first aspect, he would have had no action until he disaffirmed the trade and demanded his money (*Arendale v. Morgan*, 6 Sneed, 703); and in the second his action would have been *ex delicto*, and not upon a specific, fixed, or asserted liability within the meaning of the rule stated in respect to voluntary conveyances. Such a claim, it is obvious, might or might not ever be asserted, and it is too uncertain and remote to be taken into consideration in estimating the debts or liabilities of a debtor for which he must provide by retention of property. This is made obvious if we look at the state of affairs then existing, not as now developed."

In *Crossley v. Elworthy*, L. R. 12 Eq. 158, 168, MALINS, V. C., said:—

"This brings me to a part of the case on which much has been said on both sides; namely, whether the debt of Mr. Crossley, of £15,000, as proved in the action, can be taken into consideration. I am clearly of opinion that Mr. Glasse was right in saying that it was not necessary for him to rely upon that in order to invalidate the settlement. But I cannot bring myself to the conclusion that the liability to Mr. Crossley can be wholly disregarded. I must, as I am bound by the verdict of the jury to do, attribute to Mr. Elworthy the knowledge that he had made erroneous statements to Mr. Crossley in 1865, and those erroneous statements made him liable for a debt which he did not calculate upon when he executed the settlement, for he did not know till 1867 that the action would be brought. But the result of the action was to prove him to have become indebted in 1865, when he made the false representations by which the liability was created. I do not say that the debt would have been sufficient of itself to invalidate the settlement, but it was a circumstance which, considering the way he was involved in transactions with this company, ought to have led him to pause."

SEVERS v. DODSON.

NEW JERSEY COURT OF ERRORS AND APPEALS, NOVEMBER TERM, 1895.

[Reported in 53 New Jersey Equity, 633.]

BEASLEY, C. J. This bill was filed by the respondents, as creditors at large, to set aside a conveyance made by their debtor to his granddaughter.

The grounds taken before the Vice-Chancellor, on the part of such complainants, was that the transfer of the property was in pursuance of a scheme to defraud and delay creditors, or, failing in that contention, it was insisted that the conveyance was, at all events, without consideration, and was, therefore, constructively fraudulent as against existing debts, to which class it was alleged the claim sought to be enforced belonged.

By way of answering these grounds, the defendants contended that there was no fraud; that the conveyance was not voluntary, and that if the transaction was a mere gift, nevertheless it was equitable and legal, inasmuch as it was not an arrangement hostile to creditors.

The Vice-Chancellor's consideration of the facts led him to the conclusions that the deed was voluntary and that there was no actual fraud in the affair, but that, as the debt in question was in existence at the time of the gift, such conveyance should be annulled in accordance with the rule established in the case of *Haston v. Castner*, 4 Stew. Eq. 703.

The result was a decree setting aside the conveyance and ordering the land to be sold, the proceeds to be applied to the payment of the debt due the complainants, the amount of which was ascertained by the court.

With respect to the facts that the conveyance was purely voluntary, and that it was not tainted with fraud, the opinion of this court is in all respects in accord with that of the Vice-Chancellor. This part of the case is deemed so plain as to render all discussion of the subject utterly superfluous, but we think that the other essential fact, viz., that the complainants were creditors at the time of the transfer of the property, so far from being proved, was negatived by the evidence. F

On this subject, the uncontested facts were these: The deed of gift was dated the 3d day of April, 1886, and at that time the donor, one James Taylor, was the accommodation indorser for one Davis, who was in debt to the complainants. From time to time these notes were renewed as they fell due, the old ones being regularly taken up and new ones substituted. None of this paper was dishonored before the making of the conveyance in question, the first of them being protested about a year after that event. F

The inquiry therefore arises, whether this situation placed this case within the operation of the rule defined in *Haston v. Castner*, already cited. The doctrine propounded in that authority is this: that if a

person be indebted to another at the time of a voluntary settlement made by him, such disposition is presumed to be fraudulent with respect to such debt, and no circumstances will suffice to repel the legal presumption of fraud.

This doctrine, after full consideration, was established by this court, and it is not intended, on this occasion, to modify it in any degree. It is true that the propriety of this principle has been much discussed and much doubted, both in England and in this country, and such investigation has exhibited great contrariety in judicial opinion, but, as the question is not deemed to be an open one in this State, it would be but to supererogate to review that line of authorities.

Accepting, then, as a datum, that the gift now in question is void as respects cotemporaneous creditors, the only interrogatory here apposite is, did the complainants belong to such class?

This question, we think, must be answered in the negative. At the time in question they were not creditors of the donor. It is readily admitted that they were such in a sense that entitled them to the remedies provided in the act for the prevention of frauds and perjuries. They can, undoubtedly, set aside conveyances and transfers of property made to defeat their just claims. But at present we are not called upon to construe the statute itself, our present function being to construe the rule of evidence that this court has superinduced upon the statute. This discrimination has not always been made, and the omission has confused the subject. The act invalidates certain transfers of property infected with fraud. The rule now being considered relates to the proof of such fraud, declaring that the cotemporaneousness of the gift and the debt establishes it for certain purposes and to a definite extent.

We have said the complainants' case does not fall within this evidential rule, the reason being that they were not creditors of the donor. The latter was an accommodation indorser of current notes, and the situation did not constitute him a debtor. His assumptions might not have ripened into debts; whether they would have that effect was altogether contingent. It is obvious that to bring this case within the principle in question it is necessary to amplify, very greatly, its scope, for its terms "existing debts" would have to be metamorphosed into "existing liabilities." Such a change would be so fundamental as to deprive the principle itself of all semblance of reason or expediency. When a man is in debt, especially if such debts be due, it is certainly not irrational to infer, if he give away his property, that the intention was to defeat such claims, but such deduction would seem to be most extravagant if, instead of a present indebtedness, he has incurred a mere liability as a warrantor of title, as a tort-feasor, or as surety on an administrator's bond.¹ If such responsibilities as these latter, which

¹ In *Thorp v. Leibrecht*, 56 N. J. Eq. 499, 504, PITNEY, V. C., said:—

"This classification—counsel contend—puts a tort-feasor, *i. e.*, one who has already committed a tort upon which no judgment has been recovered, in the same category as mere sureties whose principals have not yet made default, and may never

may, in the long run, be transformed into debts, should have the effect of invalidating voluntary settlements of property, then such settlements would be the most uncertain of legal transactions. It is plain that by force of so absurd a principle all donations would, in a measure, be made contingent, and would many times remain so beyond the lives of the donor and donee.

The result, therefore, is that in order to bring a case within the operation of the rule in question, there must be a present indebtedness, and not a mere probability of future indebtedness.

The question thus considered and disposed of has never heretofore been presented to the courts of this State for decision. There are, indeed, cases that approach it but do not embrace it. What are "existing debts" within the meaning of the statute of frauds has been several times *sub judice*, but what are existing debts within the rule of evidence above defined, has never before been adjudged. It will be observed that it has been already stated that, with respect to the statute most present liabilities are under its protection against conveyances that are actually fraudulent, but that it is only debts, in the strictest terms, to which the judicial rule that, with respect to them, a voluntary transfer of property shall be void whether such transfers be fraudulent or not, is applicable. It is the former of these principles that has alone been illustrated in our decisions. Thus, in *Cook v. Johnson*, 1 Beas. 52, the plain case was presented of an indorser of a dishonored note being deemed a debtor after protest. *Phelps v. Morrison*, 9 C. E. Gr. 196; *Schmidt v. Opie*, 6 Stew. Eq. 138; *Post v. Siger*, 2 Stew. Eq. 554, are all cases in which fraud in fact existed, and were each decided on that basis. The judicial expressions used on these occasions are to be received as authority only to the extent that they regulate the class of facts to which they are applied. All that is decided is that a contingent liability, as that of an accommodation indorser, will lay a ground for a proceeding under the statute to set aside any transfer of property

do so (and hence the principals are under no present liability), or guarantors against contingencies which may never happen.

"With great deference to the high authority of the distinguished jurist who used this language, I think it plainly erroneous and feel constrained not to follow it or apply it here, for several reasons. In the first place, the case of a tort-feasor who has made himself liable for damages actually suffered and capable of measurement in money, is clearly distinguishable from that of a surety whose principal has not made and may never make default. In the one the right of action is vested and in the other it is not. In the second place, the language is a merely illustrative dictum upon a topic not under consideration by the court and not necessary for the decision of the cause in hand, and there is no evidence or reason founded in our knowledge of the mode of disposing of business by the court of errors and appeals to believe that it attracted the attention and received the approbation of a majority of that court. In the third place, it was used in the discussion of a rule of evidence and not of law or equity. The question was as to whether a voluntary settlement was to be conclusively presumed to be fraudulent and void as against a subsequent judgment founded upon a contract of suretyship existing prior to the settlement, but where there had been at its date no default by the principal debtor."

made in fraud of the holder of the claim. None of them decide that a contingent liability will, *per se*, raise an irrefutable inference of fraud so as to invalidate a conveyance made during the continuance of such a condition of affairs.

The case of *Dodson v. Taylor*, 24 Vr. 200, is not in any wise relevant to our present inquiry. The question then under advisement was, whether an accommodation indorser, before dishonor, was a debtor within the meaning of the statute for the relief of creditors against "heirs and devisees." The case presented was plainly within the statute. In the case of *New Jersey Insurance Co. v. Meeper*, 8 Vr. 282, it was declared that the act embraced within its policy even so uncertain a liability as inhered in a warranty of title to lands. It is true that in the opinion read in *Dodson v. Taylor* the view is expressed that by the mere act of indorsement a person becomes a present debtor. It is said: "But, from the time of the indorsement, he is bound for the payment of the debt, and a person so circumstanced is, in both common and legal parlance, a debtor."

It is not perceived how this doctrine is to be sustained. So far as is known, no person ever thought or styled himself, or was styled by others, a debtor by reason of his having become an accommodation indorser. If a merchant were called upon to make out a list of his debts, it is not believed that it would ever occur to him to put in such account the moneys called for in the paper that had been gratuitously indorsed by him. Under the law of this State, the debts of the citizen taxed can, to a certain extent, be deducted from his assessment, and certainly no one can doubt that if any person, for such a purpose, should include in his sworn statements the amounts secured by his accommodation indorsements, such taxpayer could be convicted of perjury. The hypothesis suggested would, in practice, be fraught with embarrassments. If, by the mere indorsement, the indorser becomes, ipso facto, a debtor of the holder of the note, then, by parity of reasoning, it follows that, from the same cause, the maker of the paper becomes the debtor of the indorser. And indeed it has, on several occasions in legal practice, been attempted to utilize this notion in the entry of judgment on bonds with warrants of attorney. Such was the cause essayed in the case of *Blackwell et al. v. Rankin*, 3 Halst. Ch. 152, the facts being that the plaintiff had taken judgment on an affidavit showing that he was the indorser on certain notes of the defendant, and which situation, it was insisted, showed a present debt. This contention is thus met by the Chancellor. He says: "It is an abuse of language to say that, because I indorse your note to-day, payable three months hence, to be used by you, you are indebted to me to-day for the amount of it, and that it is a debt due and owing to me to-day." This doctrine is pointedly approved by this court in *Clapp v. Ely*, 3 Dutch. 592.

But it is to be remembered that, while the phraseology in question is deemed to be open to this criticism, nevertheless, in the connection in which it was used, it probably embodies the legal rule that the relation

which the holder and indorser of a promissory note bear to each other is that of potential debtor and creditor, which is all that is required by the statute giving relief to creditors against devisees or legatees. This construction was the result of a consideration of the lax language of the act as enlightened by its evident policy. It was a remedial measure, and was, therefore, to be liberally construed.

But the present case demands the application of a rule the most opposite of this. We are not now called upon to ascertain the meaning of statutory language in legislative policy, our entire province being to demarcate the rule of evidence promulgated by ourselves, that makes the existence of fraud in voluntary conveyances, under a certain condition, a mere inference of law, irrespective of the truth. The rule is one of the most rigorous character, having the operation of an estoppel, and is to be kept within the narrowest limits. It is, therefore, enough for this court to say that the contingent liability of an accommodation endorser, before dishonor, does not make him a debtor so that the holder of the paper can invalidate a voluntary conveyance made by him when there was no actual fraud in the transaction.¹

¹ In *Thomson v. Crane*, 73 Fed. Rep. 327, the defendant made voluntary conveyances, not being at the time indebted other than on a guaranty that the Reno Manufacturing Company would duly perform a contract. There was "some evidence tending to show" that the defendant "manifested some anxiety or uneasiness about the financial affairs" of the Reno Manufacturing Company, or lack of confidence in its manager prior to the time of the execution of the conveyances; but the conveyances were made prior to any action on the guaranty. The court set aside the conveyances, *HAWLEY, J.*, saying:—

"It is claimed that complainants were not creditors of E. Crane until the entry of the judgment against him; that the guaranty, if signed by E. Crane, only created a contingent liability upon his part which might result in his becoming indebted to the complainants in the event that the Reno Manufacturing Company failed to faithfully perform its agreement; that such obligations are to be distinguished from those by note or bond to pay a specific sum of money at a given time where an indebtedness can be said to exist upon the signing of the note or bond, whereas the only obligation assumed by the guaranty in this case only became a fixed indebtedness when it was ascertained and determined, by the judgment, that the Reno Manufacturing Company had not kept its agreement, and the extent of its failure so to do. If this proposition can be maintained, by authority and reason, it is an end of this case; for the judgment was not obtained until after the execution and delivery of the deeds in question, and the defendants would be entitled to a judgment in their favor. . . .

"The complainants in this case do not rely solely on the judgment to establish the date when they became creditors of E. Crane. They introduced the original agreement between complainants and the Reno Manufacturing Company, and the guaranty, as signed by E. Crane, on the 10th of May, 1892, which was prior to the time of the execution of the deeds herein sought to be set aside. A creditor is not simply a person to whom a debt is due, but a person to whom any obligation is due. It is a person who has the right to require the fulfilment of any obligation, contract, or guaranty, and he is to be considered as a creditor of such obligor or guarantor from the time of his entering into the obligation. ?

"The general principle, applicable to the facts of this case is well expressed in 8 Am. & Eng. Enc. Law, 750, as follows:—

"‘A creditor, in this connection, is not, necessarily, the holder of a debt merely, as that term is generally understood; for one having a legal right to damages capable of

judicial enforcement is a creditor, within the meaning of the statutes and law upon the subject of fraudulent conveyances. So, where one incurs liability for another, as surety or the like, he may be considered as a creditor of the latter from the time of entering into the obligation, and various other claims, absolute or contingent, have been held sufficient to constitute the holders thereof creditors.'

"In addition to the authorities there cited, see *Yeend v. Weeks*, 104 Ala. 331; *Hunsinger v. Hofer*, 110 Ind. 390; *Bowen v. State*, 121 Ind. 235.

"In *Bowen v. State*, the court said:—

"It is manifest, as it seems to us, that the liability of a surety on a guardian's bond must be governed by the same general principles which govern the liabilities of sureties on other obligations; that he cannot give away all of his property to the detriment of those for whose benefit the bond is given. The contract of suretyship is in force from the date of the execution of the bond, though the liability of the surety to pay depends upon the conditions of the bond.'

"In *Yeend v. Weeks*, the court said:—

"It must be stated, in this connection, that an administration bond is a continuing obligation of security from the day of its execution to the termination of the administrator's authority to act; and, though it antedates a voluntary conveyance, yet the ascertainment of its breach, by proper judicial proceeding, begun and concluded after the execution of such conveyance, will, as between the judgment creditor and the grantor in the conveyance, relate back to the date of the bond, and be held to be a debt existing at the time. . . . A contingent claim is as fully protected as a claim that is certain and absolute."

In accord with *Thomson v. Crane*, besides cases therein cited, see *Rider v. Kidder*, 10 Ves. 360; *Bragg v. Patterson*, 85 Ala. 233; *Yeend v. Weeks*, 104 Ala. 331; *McLaughlin v. Bank*, 7 How. 220; *Reel v. Livingston*, 34 Fla. 377; *Sanderson v. Snow*, 68 Ill. App. 384; *Hatfield v. Merod*, 82 Ill. 113; *Howe v. Ward*, 4 Greenl. 195; *Pulsifer v. Waterman*, 73 Me. 233, 238; *Williams v. Banks*, 11 Md. 198, 242; *Pashby v. Mandigo*, 42 Mich. 172; *Ames v. Dorroh*, 76 Miss. 187; *Post v. Stiger*, 29 N. J. Eq. 554, 559; *Shurts v. Howell*, 30 N. J. Eq. 418; *Jackson v. Seward*, 5 Cow. 67; *Van Wyck v. Seward*, 18 Wend. 375; *Young v. Heermans*, 66 N. Y. 374, 384; *Kerber v. Ruff*, 4 Ohio Dec. 406; *Hamet v. Dundass*, 4 Barr. 178; *Beach v. Boynton*, 26 Vt. 725; *Mason v. Pierron*, 69 Wis. 585. *Contra* is *Henderson v. Dodd*, 1 Bailey, Eq. 138.

It is to be noticed that in many of these cases there was evidence of an actual intent to defraud the contingent creditor.

In *Bridgford v. Riddell*, 55 Ill. 269, one holding a warranty of title in a deed of real estate was held not to be an existing creditor of the warrantor at any time prior to eviction. But see *contra*, *Wright v. Nipple*, 92 Ind. 310.

HARLAN v. MAGLAUGHLIN.

PENNSYLVANIA SUPREME COURT, 1879.

[Reported in 90 Pennsylvania, 293.]

ERROR to the Court of Common Pleas of Cumberland County, of May Term, 1879, No. 89.

Ejectment by Maud Maglaughlin and Wilmer K. Maglaughlin, by their guardian, William A. Coffey, against Anne Harlan and David Sipe, for two lots in Carlisle, Pennsylvania.

On March 31, 1859, John Mell conveyed by a deed a lot of ground to Isabella Noble, wife of John B. Noble, for \$50. This deed was duly recorded August 27, 1859. To the same grantee William Blair conveyed by deed a lot of ground on March 20, 1865, for \$200, which deed was recorded March 28, 1868. On March 5, 1869, John B. Noble made a note payable to Christ. Kindler, upon which suit was brought and judgment recovered for \$129.47, with interest from 22d September, 1869. *A. fi. fa. and vend. ex.* issued upon this judgment, and the above-mentioned lots were sold, as the property of John B. Noble, in 1870, to Charles E. Maglaughlin, whose heirs bring this ejectment. Isabella Noble, dying about 28th June, 1875, letters of administration on her estate were issued to J. J. Good, who, under an order of the Orphans' Court of Cumberland County, sold the above lots, October 31, 1877, to David Sipe, one of the defendants.

At the trial, before HERMAN, P. J., the plaintiff gave evidence tending to show that John B. Noble paid for these lots, and directed the name of his wife to be used as that of the grantee therein. There was also evidence that, when the first deed was made, Noble was indebted to different parties in the sums of \$3.37 and \$60, payment of which was not shown; that, in the year 1859, after the Mell deed was made, debts were contracted to the following amounts: May 10, \$18; May 20, \$45; November 29, \$39 (reduced October 14, 1861, to \$35.49). In the year 1860, as follows: January 13, \$60, which was paid; February 22, \$21.92, likewise paid. Judgment, April 14, 1860, for \$5 penalty for use of scales at suit of Borough of Carlisle; and in 1862, May 14, \$4.02, which was paid; another, originally \$65, but, 26th November, 1862, reduced to \$6.50.

As evidence of fraudulent intent on the part of Noble in having these conveyances made to his wife, one Foote testified that Noble "told me before the war, in 1859, that he was in a good bit of trouble, and that he was going to put what he had, his property, over into Belle's hands. He called his wife Belle."

[The defendants submitted several points of law, the statement of which and the answers of the court thereto are here omitted, as a single

question of law only was involved, and that is sufficiently stated in the opinion.]

The verdict was for the plaintiffs. Defendants took this writ, and, *inter alia*, assigned for error the answers to the above points.

W. Trickett, J. W. Wetzel, and W. F. Sadler, for plaintiffs in error. The broad form of the instruction with respect to future creditors, in the answers which are assigned as errors, left the jury open to a misapprehension of the meaning of the word "defraud," when applied to remotely future creditors. The only conceivable sense in which the facts enumerated would make it inferable that Noble, in 1859, intended to hinder and defraud a debt which began in 1869, is that of the bare purpose to put the property in his wife, so that it should not be in danger of being taken from her by debts at any time in the future to be contracted. But this is the purpose of all settlements on wives.

The jury were in substance told that if the effect of the conveyance to the wife was to hinder and delay creditors to whom the grantor subsequently became indebted, and that the grantor, in making it, contemplated that it might have that effect, it would be fraudulent and void. This was clearly erroneous. *Snyder v. Christ*, 3 Wright, 507; *Williams v. Davis*, 19 P. F. Smith, 28.

When future creditors are deemed defrauded, it is invariably where the debts arise soon after the transfer, when the circumstances warrant the presumption of the injury to the creditor by a dependence on the continued ownership of the debtor. *Williams v. Davis*, *supra*; *Nippe's Appeal*, 25 P. F. Smith, 478; *Snyder v. Christ*, *supra*. Or when some new or hazardous business is contemplated. *Black v. Nease*, 1 Wright, 433; *Monroe v. Smith*, 29 P. F. Smith, 462. The deeds here were also of record. The jury were in substance told that from the bare fact of debts, when the Mell deed was made, which in fact were hindered, &c., they can find an expressly fraudulent intent with respect to a debt not contracted until ten years after the recording of the Mell deed. Under this instruction fraud, in law, is made sufficient evidence of fraud in fact. Contemporaneous debts, in fact delayed, show fraud in law; and from this fraud in law alone, the jury are permitted to infer fraud in fact, in respect to debt originating ten years later.

S. Hepburn, Jr., and *S. Hepburn*, for defendants in error. The Statute of 13 Elizabeth protects creditors whose debts accrue subsequent to the fraudulent conveyance, equally as well as those whose debts were due when it was made. *Twyne's Case*, 1 Sm. L. Cas. 5; *Townshend v. Windham*, 2 Ves. 11; *Taylor v. Jones*, 2 Atk. 600; *Anderson v. Roberts*, 18 Johns. 526.

Where there is a voluntary settlement and indebtedness at the same time, and the recovery of these debts is delayed, hindered, or defeated, such settlement is fraudulent and void, and the avoidance of it, on account of such indebtedness, lets in the subsequent creditors on the property to satisfy their debts. *Thompson v. Dougherty*, 12 S. & R. 455. The intent with which a conveyance was made is for the jury to determine.

Mr. Justice GORDON delivered the opinion of the court, October 6, 1879.

The court below fell into an error which pervades every part of this case. A single point and answer will serve to develop this error, and determine the material questions involved in this controversy. The counsel for the defendants below, plaintiffs in error, asked the court to say to the jury that "to render a voluntary conveyance void, as to subsequent creditors, it must appear that it was made in contemplation of future indebtedness, and, until this was shown, the plaintiffs could not call upon the defendants to prove the consideration for the conveyance to Isabella Noble through whom they claim title." The court answered: "This would be so, if, at the time of the voluntary conveyance, no debts of the grantor existed, the recovery of which would be thereby delayed, hindered, or defeated. Where there are existing debts at the time, and the conveyance has delayed, hindered, or defeated their recovery, this circumstance raises a suspicion of fraud from which an intent to defraud subsequent as well as existing creditors may be inferred."

This language is borrowed from the case of *Thompson v. Dougherty*, 12 S. & R. 448, where it is applied, as in the case in hand, to debts contracted after the execution of the voluntary grant. It is, however, mere *obiter dicta*, not called for by the facts in the case, and not true in law. Notwithstanding the many loose declarations in the books to the contrary, the Statute 13 Elizabeth does not make voluntary conveyances void as to future creditors, unless there is some evidence to indicate that the grantor intended to withdraw his property from the reach of such creditors. *Snyder v. Christ*, 3 Wright, 499. And it is properly said in *Williams v. Davis*, 19 P. F. Smith, 21, that even an expectation of future indebtedness will not render a voluntary conveyance void where there is no fraud intended by such conveyance. And so, also, in *Thompson v. Dougherty*, Mr. Justice Duncan, citing *Saxton v. Wheaton*, 8 Wheat. 229, says: "Chief Justice Marshall decided that a post-nuptial settlement on a wife and children by a man who is not indebted at the time was valid against subsequent creditors, and that the statute does not apply to such creditors if the conveyance be not made with a fraudulent intent." A similar ruling will be found in *Townsend v. Maynard*, 9 Wright, 198, and in *Greenfield's Estate*, 2 Harris, 489. In the latter case, which involved a deed of trust of all the grantor's property, it was alleged by Mr. Justice Bell to be a sound rule of law that subsequent indebtedness cannot be invoked to invalidate a voluntary settlement made by one not indebted at the time, or who reserves sufficient to pay all existing debts, unless there be something to show that the settlement was made in anticipation of future indebtedness. It is further said that though some doubt was thrown on this principle by *Thompson v. Dougherty* it was afterwards dissipated by *Mateer v. Hissim*, 3 P. & W. 161. Furthermore, the case of *Snyder v. Christ*, above mentioned, which is very like the case

in hand, settled any doubts that may previously have existed as to the effect of subsequent indebtedness. For though it seems to have been generally admitted that the statute is not operative as to such indebtedness, yet the admission has been so beclouded by apparently inconsistent dicta and qualifications as to render its meaning obscure and unintelligible. The settlement is good against after contracted debts if the settlor is unindebted at the time, or if he has made provision for existing debts, and so on. But how if there be existing debts not provided for, and how if the settlement is fraudulent as to such debts? Will the settlement, in such case, be void as to all future indebtedness? Is there no place for repentance and atonement by the after payment of existing debts, or may after creditors, notwithstanding such payment, avoid the deed? Justice Duncan answers these questions by saying: "If the jury find a prior indebtedness, and any of that class of creditors is defeated by the settlement, then my opinion is that the property conveyed is to be considered as part of the estate of the debtor for the benefit of all his creditors. I know no midway. When a statute declares a matter void it thrusts all to destruction like a tyrant, while the common law, like a nursing father, makes that void where the fault is and preserves the rest." In this, singularly enough, the fact is overlooked that the statute makes the gift or deed void only as to those who may be hindered, delayed, or defrauded thereby, and that in this it follows the common law. This oversight, however, would seem to be accounted for by the fact that the opinion of Chief Justice Spencer, in *Anderson v. Roberts*, 18 Johns. 526, is adopted, wherein it is said that the Statute of 13 Elizabeth protects creditors whose debts accrue subsequently to the fraudulent conveyance equally as those whose debts were due when it was made.

It would seem to be on this that Justice Duncan founds the assertion, already referred to, that the existence of prior debts creates a suspicion of fraud, which can only be repelled by showing that the subsequent creditors were provided for in the settlement. This, as it stands, is unintelligible; for one cannot provide for what he does not anticipate; if he has no future debts in contemplation, how is it possible to make provision for them? It, in fact, simply amounts to saying that the statute is operative upon subsequent, as well as present, indebtedness. In like manner, it has been said, the settlor must not only retain property enough to satisfy present debts, but also to answer the reasonable probabilities of the future. But this rule is unreasonable in this, that it prevents men of limited means from making any settlement whatever upon their wives and children, a result certainly not contemplated by the statute. Besides this, the attempt to keep men and women in judicial leading strings all their lives, to direct what they shall or shall not do with their own property, is a matter which commends itself neither to sound legal reason nor to common sense. If a man is in debt, he may not give away his property until he has paid or provided for such debt; the reason for this is found in the principles

of common honesty. If he contemplates future indebtedness, he must, for a like reason, provide for it, but he must not provide for what he does not anticipate, and for what may never occur. And if, without concealment, a man chooses to give away all his estate, or settle it upon his wife and children, what right has a subsequent creditor to complain? It did him no harm; he gave the grantor no credit because of such property; he is, therefore, neither cheated nor impoverished by such gift. Furthermore, if A., by a voluntary conveyance, defrauds B. this year, how is C., whose debt has no existence until ten years after, defrauded by that same conveyance? It certainly will not do to say that because B. was cheated therefore C. is cheated, for between B. and C. there is no possible connection or privity. But if C. has not been defrauded by the grant, then, if the statute means what it most expressly says, he cannot impeach it.

We turn, therefore, with satisfaction to the case of Snyder v. Christ, where we have the plain and unambiguous declaration that the subsequent creditor can avail himself only of that fraud which is practised against himself. The doctrine thus announced is made the more positive in that it is said if the creditor knew of the voluntary conveyance when he gave the credit he could not be defrauded thereby, and hence could not impeach it.

This case, not only from the direct manner in which the principal subject of discussion is treated, but also by reason of the facts upon which it depends, must be regarded as a final determination of the question in hand.

These facts are, briefly, as follows: John Snyder, being the owner of a tract of one hundred acres of land, conveyed it to one John Reger, in trust for the use of himself and wife for their joint lives and the life of the survivor of them, with remainder to two children of the wife, and to such children as the grantors might have. This was all the real estate Snyder owned, and it was in proof that, at the date of the deed, his debts amounted to some \$200, and that his personal property did not exceed in value \$150. Furthermore, he had expressed apprehensions of a claim for damages for a breach of promise suit of marriage, and, within a few days after the making of the deed, he had borrowed \$200, and had also contracted the debt on a judgment for which the property in suit was sold.

Here, then, we have every element necessary for a test case. A voluntary deed in trust of all the grantor's real estate, providing, *inter alia*, for himself for life; existing debts unprovided for, and as to which this deed was undoubtedly fraudulent; no property reserved for the reasonable probabilities of the future, an immediate contraction of subsequent debts, and an expressed apprehension of a pending claim for damages. It was, nevertheless, held, that of these facts the subsequent creditor could not avail himself, unless he could further show that a fraud was intended against himself. In other words, these facts standing alone did not make for him even a *prima facie* case.

Snyder v. Christ was followed in Monroe v. Smith, 29 P. F. Smith, 459, in which it was said that a deed, void as to existing creditors, by reason of the grantor's fraud, is not necessarily void as to subsequent creditors; that it is bad only as to those it is intended to defraud.

It is scarcely necessary to say that these cases rule the one now under consideration. The deed of John Mell to Isabella Noble was executed on the 31st of March, 1859, and was recorded in August of the same year. The deed of William Blair to Mrs. Noble was made March 20, 1865, and was recorded 28th of March, 1868. The judgment of Kindler v. John B. Noble, upon which the property in dispute was sold, was founded on a note dated March 5, 1869, ten years after the date of the first deed, and nearly three years after the date of the second. When, in addition to this, we reflect that Noble's debts at no time were large; that the testimony of Foote relates to declarations made by Noble ten years before Kindler's debt had an existence; that there is not one particle of evidence, direct or indirect, that a fraud was intended on future creditors, we must certainly conclude that the plaintiffs had no case, and that the court should so have instructed the jury.

*The judgment is reversed, and a venire facias de novo is awarded.*¹

¹ Horbach v. Hill, 112 U. S. 144; Schreyer v. Scott, 134 U. S. 405, 411; Horn v. Volcano Water Co., 13 Cal. 62; Walter v. Laue, 1 MacArthur (D. C.), 275; Mixell v. Lutz, 34 Ill. 382; Springer v. Bigford, 160 Ill. 495; Lynch v. Raleigh, 3 Ind. 273; Hutchinson v. First Nat. Bank, 133 Ind. 271; Sheppard v. Thomas, 24 Kan. 780; Voorhis v. Michaelis, 45 Kan. 255; Todd v. Hartley, 2 Met. (Ky.) 206; Fullington v. Northwestern, &c. Assoc., 48 Minn. 490; First Nat. Bank v. Brass, 71 Minn. 211, 215; Simmons v. Ingram, 60 Miss. 886; Bauer Grocery Co. v. Smith, 74 Mo. App. 419; Gardner v. Kleinke, 46 N. J. Eq. 90; Minzesheimer v. Doolittle, 56 N. J. Eq. 206, 230; Neuberger v. Keim, 134 N. Y. 35; Crawford v. Beard, 12 Ore. 447; Ditman v. Ranle, 124 Pa. 225, acc.

In Brundage v. Cheneworth, 101 Ia. 256, 263, the court, modifying expressions in earlier cases, said: "We think the correct rule is: (1) A conveyance which is merely voluntary, and when the grantor had no fraudulent view or intent, cannot be impeached by a subsequent creditor. (2) A conveyance actually and intentionally fraudulent as to existing creditors, as a general rule, cannot be impeached by subsequent creditors. (3) If a conveyance is actually fraudulent as to existing creditors, and merely colorable, and the property is held in secret trust for the grantor, who is permitted to use it as his own, it will be set aside at the instance of subsequent creditors. The second rule above laid down is subject to some exceptions, among which may be mentioned cases in which the conveyance is made by the grantor with the express intent and view of defrauding those who may thereafter become his creditors; cases wherein the grantor makes the conveyance with the express intent of becoming thereafter indebted; cases of voluntary conveyances, when the grantor pays existing creditors by contracting other indebtedness in a like amount, and wherein the subsequent creditors are subrogated to the rights of the creditor whose debts their means have been used to pay; cases in which one makes a conveyance to avoid the risks, or losses, likely to result from new business ventures, or speculations. The following authorities will be found to support the above rules and exceptions: Wait, Fraud. Conv., §§ 96, 97, 98, 100; Bump, Fraud. Conv. (4th ed.), §§ 290, 293, 296, 300; 2 Pomeroy, Eq. Jur., §§ 971-973; 1 Am. Lead. Cas. (5th ed.), p. 42, notes. We have not overlooked the fact that there are respectable authorities holding that a conveyance actu-

MARSTON v. MARSTON.

MAINE SUPREME JUDICIAL COURT, 1867.

[Reported in 54 Maine, 476.]

APPLETON, C. J. On the 17th February, 1857, the defendant, Oliver B. Marston, being the owner of the demanded premises, conveyed the same to his brother Joseph Marston for the consideration of fifteen hundred dollars, as expressed in the deed, for which sum he received the note of Joseph Marston. The same day Joseph Marston deeded the land of which he had thus acquired the title, to Fanny Marston, the wife of Oliver B. Marston, and took back the note he had just given.

The plaintiff was a creditor of Oliver B. Marston prior to these conveyances. They were without consideration, and their obvious purpose and effect was to hinder, delay, and defraud creditors, and such purpose and effect could not but have been known to all the parties to these transactions.

Though the plaintiff renewed his original note by taking a new one since these conveyances, it does not affect his legal rights, for a conveyance made without consideration, and for the purpose of defrauding creditors, is void as well against subsequent as prior creditors of the grantor. Clark v. French, 23 Maine, 221; Wyman v. Brown, 50 Maine, 139.¹

If the conveyances referred to were fraudulent and void as to creditors, the plaintiff might impeach them. Being void, the title is regarded as remaining in the fraudulent grantor, and the judgment creditor by a levy acquires such seisin as enables him to maintain a real action against the fraudulent grantor or grantee.

In cases like Houston v. Jordan, 38 Maine, 521, Low v. Marco, 53 Maine, 45, and Howe v. Bishop, 3 Met. 28, where the legal title was never in the judgment debtor, the creditor does not acquire the legal title by a levy. But in the present case the legal title was in Oliver B. Marston, and his conveyance being fraudulent, the plaintiff by his levy acquired the title.

Defendant defaulted.

ally fraudulent as to the existing creditors may for that reason alone be avoided by subsequent creditors. We are not, however, prepared to assent to the correctness of such a doctrine. Under our holding, the petition stated a good cause of action under the third rule above stated, and hence the demurrer was improperly sustained."

¹ Burdick v. Gill, 7 Fed. Rep. 668; Echols v. Orr, 106 Ala. 237; Jordan v. Collins, 107 Ala. 572; Prestwood v. Troy Fertilizer Co., 115 Ala. 668; May v. State Nat. Bank, 59 Ark. 614; Wilcoxen v. Morgan, 2 Colo. 473; Mulock v. Wilson, 19 Colo. 296; Ruffing v. Tilton, 12 Ind. 259; Dart v. Stewart, 17 Ind. 221; Jones v. Light, 86 Me. 437; Day v. Cooley, 118 Mass. 524, 527; McConihe v. Sawyer, 12 N. H. 396; Smyth v. Carlisle, 16 N. H. 464, 17 N. H. 417; Doe dem. Flynn v. Williams, 7 Ired. L. 32; Trezevant v. Terrell, 96 Tenn. 528; McLane v. Johnson, 43 Vt. 48; Pratt v. Cox, 22

HAGERMAN v. BUCHANAN.

NEW JERSEY COURT OF ERRORS AND APPEALS, MARCH TERM, 1889.

[Reported in 45 New Jersey Equity, 292.]

REED, J. The complainants below furnished lumber to J. H. Hagerman & Son between the dates of July 24, 1886, and November 29, 1886. On March 4, 1889, a judgment was recovered in the Supreme Court for the sum of \$958.53, the price of said lumber. Under a *fi. fa.* issued thereon, a certain house and lot in Asbury Park was levied upon. The title of this property stood in the name of Sarah Hagerman, the wife of the defendant, John H. Hagerman. It was conveyed to her by her husband, through an intermediate person, on July 17th, 1885. The bill in this case was filed by Buchanan & Co., the judgment creditors, for the purpose of having the conveyance made by Hagerman to his wife declared void, upon the ground that it was made to hinder and delay creditors, and to have the property sold and the proceeds applied to the payment of their judgment. The court below advised that the case stood in the same posture as that of *Demorest v. Terhune*, 3 C. E. Gr. 532, and that the rule adopted in that case was properly applicable to this. A decree was accordingly made that the deed made by Hagerman to his wife should be regarded only as a security for the consideration actually paid by her.

It is perceived that the debt of the complainant was contracted over three years after the conveyance was made which is attacked. If the conveyance is to be regarded as in a degree voluntary, the creditor has a burden imposed upon him which would not exist had his debt antedated the deed. The character of a voluntary conveyance, when attacked by a creditor having a pre-existing claim, is definitely settled in this court. In the case of *Haston v. Castner*, 4 Stew. Eq. 697, after

Gratt. 330; *Johnson v. Wagner*, 76 Va. 587, 591; *Silvernail v. Greaser*, 27 W. Va. 550, acc.

In a few cases the statement of the law is qualified as in England by the requirement that some antecedent debt must be still unpaid. *Toney v. McGehee*, 38 Ark. 419 (conf. *May v. State Nat. Bank*, 59 Ark. 614); *Barbour v. Conn. Mut. L. I. Co.*, 61 Conn. 240, 251; *Claffin v. Mess*, 30 N. J. Eq. 211 (conf. *Allaire v. Day*, 30 N. J. Eq. 231). In the case last cited the court say: "According to the complainant's proofs the husband procured the lands to be conveyed to his wife after he became insolvent, with design to save his property from his creditors. This rendered the deeds fraudulent in fact, and voidable by either antecedent or subsequent creditors. *Cook v. Johnson*, 1 Beas. 54; *Belford v. Crane*, 1 C. E. Gr. 271; *Ridgeway v. Underwood*, 4 Wash. C. C. 137. There are authorities which hold that a subsequent creditor may impeach a voluntary conveyance simply on the ground that it was executed in fraud of antecedent creditors, but in that case he is bound to show that some of the antecedent debts still remain unpaid. *Hunt on Fraud. Conv.*, 52; 1 Am. Lead. Cas., 41; *Spirett v. Willows*, 3 DeG. J. & S. 292; *Freeman v. Pope*, L. R. (9 Eq. 205); s. c. L. R. (5 Ch. Ap.) 536."

But in *Gardner v. Kleinke*, 46 N. J. Eq. 90, it was held that even though antecedent creditors set a conveyance aside, subsequent creditors could only share in the proceeds if the conveyance was fraudulent as to them.

an elaborate review of the course of judicial sentiment in this State, it was decided that, in respect to debts existing at the date of a voluntary conveyance, the deed was void by force of the statute relating to frauds and perjuries. Against the attack of a creditor belonging to this class, neither the motive which induced the deed, nor the solvency of the grantor at the time of its execution, nor any other circumstance which might bear upon the *bona fides* of the parties to the conveyance, is important. Fraud is the legal conclusion arising from the contemporaneous concurrence of the two facts, namely, a voluntary deed and an existing debt due by the grantor.

In respect to the attitude which subsequent creditors bear towards a voluntary conveyance, there has not been, so far as I recall, a deliverance by this court. But the sentiment, both judicial and professional, is hardly less doubtful upon this than upon the former question. The rule which has been recognized is, that a voluntary settlement can be attacked by a subsequent creditor only upon the ground of the existence of an actual intent in the mind of the parties at the time of the execution of the conveyance to hinder, delay, or defraud creditors by means of the deed. . . .

By reason of [the] recognitions of cases in which the distinction above mentioned has been formulated, and by reason of the rational grounds upon which such a distinction rests, I regard the complainant in this case as having the burden of showing that, at the time the conveyance was made, there existed an actual intent to hinder and delay creditors. This conclusion appears the more reasonable after an examination of the cases in the English courts dealing with this subject. From such an examination it appears that, while there has been considerable fluctuation in judicial sentiment in respect to the attitude of prior creditors who attack a voluntary conveyance, there is little or none in respect to the posture of subsequent creditors. As to the latter of the two classes of creditors, the rule has been quite uniform, that an actual fraudulent intent to defraud some creditor must be proved.

In an attack upon such a conveyance by a subsequent creditor it is true that the fact that there were pre-existing debts has always been considered more or less important in determining the existence of a fraudulent intent. Different equity judges have accorded to the existence of such debts different degrees of probative force, and have raised from the fact of their existence certain indisputable presumptions, but the line of adjudications is opposed to the notion that the existence of a prior debt of any amount raises a conclusive presumption that a voluntary conveyance is fraudulent as against the attack of a subsequent creditor. May Fraud. Con., 64.

The rule laid down by Chancellor Kent and Judge Washington is not only simple, but equitable.

A conclusive presumption against a voluntary conveyance should be raised in respect to those debts which it may be presumed were incurred upon the faith of the ownership of the property conveyed. ?

It is therefore inequitable that the debtor should be permitted to give away such property at the expense of a pre-existing creditor, whether the intention be good or otherwise. But as to creditors who become such without any possible inducement arising from such ownership, no such conclusive presumption should arise. No equitable consideration requires it; and, besides, if such a rule be adopted, no settlement could be made which would not be at the mercy of the grantor during his lifetime. The power to incur debts would be a power to subject the property to a liability for their payment at any time. So, as already remarked, equitable considerations, as well as the weight of authority, are in favor of the rule that an actual intent to defraud, arising from all the circumstances surrounding the transaction, must be proved before a voluntary conveyance will be decreed void at the suit of a subsequent creditor.

An observation seems appropriate in respect to the legal terms which are employed in dealing with these two classes of cases. Void voluntary conveyances, when spoken of in respect to either class of creditors, are styled fraudulent, but as to the former class there is said to be legal fraud, and as to the latter class actual fraud.

There is force in the remark of Mr. Bigelow, that the term "legal fraud" is a misnomer. The word "fraud" implies moral turpitude. When a transaction is voided by the statute without respect to the motive which induced it, but upon considerations of policy only, it is unlawful and not fraudulent. To style it fraudulent, whether the fraud be legal or otherwise, may fix an unmerited stigma upon the party to the transaction. A more just and appropriate appellation to apply to conveyances of the former class would be simply unlawful, while the term "fraudulent" would still properly be applicable to the latter class of conveyances.

The question of fact remains to be considered, whether there was an intention existing in the mind of the parties to the present conveyance to hinder and delay creditors, which induced the execution of the deed. In the first place, the facts proved show that that conveyance was voluntary only in respect to a slight proportion of the value of the property sold. The wife, at the time of the conveyance, was a creditor of her husband. According to the testimony, the lot sold was worth about \$2,000. Mr. Hagerman says the house, outhouses, barns, and fences cost \$2,500. The whole property was worth from \$4,500 to \$5,000.

The claims of the wife against her husband were the following: She had owned property in Brooklyn before she and her husband removed thence to Ashbury Park. In 1876, she sold this property, upon which there was a mortgage for \$5,000 for the sum of \$7,400. The balance, amounting to \$2,400, she loaned to her husband. He gave her a mortgage to secure this loan, with the interest thereon, amounting together to the sum of \$2,814. There was upon this property, upon which the mortgage was given, another mortgage of \$600, which mortgage she paid from the proceeds of some building and loan association stock

which she owned. If interest be allowed her on her mortgage from December 6, 1879, to July 17, 1883, it would amount to \$610 more. There is nothing in the case to show that she should not be entitled to interest, as would any other mortgagee.

It is true that she lived in the house, but, nevertheless, it was the home of her husband, and it was her home because it was his home. She cannot be regarded as a mortgagee in possession. The husband owned the legal title and was himself in possession of the property.

Nor does the fact that she took in boarders and received compensation therefor change this condition of affairs. She says that she expended the money so received in the care and reparation of the property. But if this be not so, it would not affect the position of the husband as the head of the family in possession, for if she took the proceeds of the boarders it was the proceeds of her own labor, which the husband had the right to permit her to appropriate. *Peterson v. Mulford*, 7 Vr. 481; *Luse v. Jones*, 10 Vr. 707.

Indeed, the reception of boarders seems to have been a mere incident of the housekeeping, and in no way diminished the value of the use of the property to Mr. Hagerman, but probably diminished the housekeeping expenses which would otherwise have fallen legally upon him. So I regard the amount of the indebtedness of the husband to the wife as reaching to the sum of \$4,000.

I place the value of the house from \$4,500 to \$5,000, and I doubt if it would have brought more than the latter sum in the market. So, the difference between the wife's claim and the value of the property which she received is not great.

But there is another fact which still further reduces the amount of this difference: the wife had her inchoate right of dower in the property, the value of which, of course, could not be applied to the payment of her husband's creditors. The fact of this encumbrance upon the property, in some degree, diminishes its salable value.¹ So, I think it appears true, as I have already remarked, that the voluntary element in this transaction is small relative to the entire value of the property, and this is a material feature in solving the question whether the conveyance was fraudulent.

The point strongly insisted upon by the counsel for the complainants was, that it appeared that on the day the deed was given, Mr. Hagerman entered into a partnership. He became a member of the firm of J. C. Farr & Co. He gave for his interest in the firm two promissory notes of \$7,500 each, both amounting to \$15,000. It appears that this firm became insolvent in three or four months thereafter. It is argued that this shows that Mr. Hagerman was entering upon a hazardous enterprise, and that this deed was made to place his property beyond the reach of future creditors.

¹ If creditors set aside a deed as fraudulent the right of dower attaches again, even though the wife had released it. Creditors have only the right to restore the status quo before the fraudulent transfer. *Bigelow on Fraud*, II. 66; *Bump on Fraudulent Conveyances*, § 478.

Now, it is true that the fact that a person has entered into a hazardous business, or engaged in a speculative enterprise, at or soon after the execution of a voluntary conveyance, is strong evidence of a fraudulent intent. It evinces a desire to reap the benefit for himself if successful, and escape responsibility if unlucky. Nevertheless, each case must stand upon its own footing, and no legal rule can be adopted as to the quantity of proof or the particular complexity of facts which will annul a conveyance upon this ground. The character of the business, the degree of pecuniary hazard incurred, the amount of property remaining in the grantor, the value of the property conveyed, the acts and words occurring coincidently with the transaction, are to be viewed together in solving the question of fraudulent intent.¹

Now, viewing these transactions together, I do not think such an intent has been proved. I think that Mr. Hagerman inquired, as he says he did, particularly about the business of Farr & Co., and that he tried to be careful not to involve himself in a precarious business.

I think it was only when he was convinced by the persuasions of Mr. Farr that it was entirely safe, and that the amount of his notes would be paid out of the proceeds, that he entered into the business. He says it was understood that the old firm had assets to the amount of \$40,000, and that the liabilities which the new firm assumed were only \$15,000 or \$20,000. Although in fact the business was risky, as the result disclosed, as Hagerman understood it at the time he became connected with it, it did not so present itself. He undoubtedly wished to place his wife in a position of security, as she had frequently requested. But this is the object of every settlement. She had no security for the \$600. Taking into consideration the fact that he says that he had \$1,800 in bank and a lot worth \$600, that the voluntary elements in the conveyance are so small, and that he seems to have been led to believe that the business he afterwards engaged in was entirely safe, I do not think it proved that the conveyance to his wife was induced by a fraudulent intent to hinder and delay creditors.

The decree below should be reversed.

Decree unanimously reversed.

¹ Bigelow in his work on Fraud, II. 112, regards a conveyance made immediately before embarking upon a hazardous business as necessarily or constructively fraudulent. Though in such a case there is always strong evidence of fraud the question seems one of fact in every case. *Munzesheimer v. Doolittle*, 56 N. J. Eq. 206, 230; *Todd v. Nelson*, 109 N. Y. 316; *Williams v. Davis*, 69 Pa. 21; *Harlan v. Maglaughlin*, 90 Pa. 293, 297; *Sommermeier v. Schwartz*, 89 Wis. 66. See also *Schreyer v. Scott*, 134 U. S. 405; *Gable v. Columbus Cigar Co.*, 140 Ind. 563; *Neuberger v. Keim*, 134 N. Y. 35.

STRATTON v. EDWARDS.

MASSACHUSETTS SUPREME JUDICIAL COURT, MARCH 21—OCTOBER 19,
1899.

[Reported in 174 Massachusetts, 374.]

MORTON, J. The conveyance in question was made about a month before Caroline G. Mussey was adjudged insolvent on her own petition, and at a time when she was owing more than she could pay. Subsequent to the filing of the bill Edward W. Mussey, husband of said Caroline, was admitted as a party defendant, and filed an answer. The case was heard by a justice of the Superior Court, and comes here on his report of the facts and of his findings. There was no decree.

The questions are, first, whether the property which the said Caroline conveyed was held by her upon a valid trust for her husband, and, second, whether if there was an element of trust in her holding of the property this court will uphold and enforce the trust as against her creditors. It appears that the property in question originally belonged to the husband, and consists of two parcels of real estate. The first is a dwelling-house and lot on Warren Avenue, Boston, occupied by Mr. and Mrs. Mussey as a home, and was conveyed by him to her through a third party, without consideration, in 1883. The second is a store on Cornhill, and was conveyed to her in the same manner, without consideration, in 1890. The legal title to both parcels remained in her till the conveyance which is the subject of this suit.

The presiding justice found that "at the time of this conveyance [of the Cornhill property] and in accordance with certain oral statements made by him [Mr. Mussey] to Mrs. Mussey, she wrote in pencil a statement in the nature of a declaration of trust, which on December 6, 1890, she copied in ink and signed with her own hand." This statement, as the presiding justice also found, was taken by Mr. Mussey, and "had since remained with other papers in the deposit vault box, to which he and Mrs. Mussey had access." The material part of this declaration is as follows: "145 Warren Ave., Boston, Mass., December 6th, 1890. December 3d, 1890, Ned [Mr. Mussey] transferred a mortgage to me, also the store in Cornhill he deeded to me, both to be held in trust for him by me just the same as I hold this house we are now living in, to be held for him in trust by me. He can sell it or do just the same with it as before, as it is his just the same." Then follow statements that it [the memorandum] was made at his request, as he was not satisfied with the pencil memorandum, and that she was going to ask him to put it in the box at the safety vault, and that in deference to his request "to write it on something I could always find it," she had written it on something that she should always keep. The presiding justice also found that Mrs. Mussey sent to her mother a letter, of

which the material portion is as follows: "Boston, Dec. 4th, 1890. . . . Yesterday he [Mr. Mussey] deeded the store in Cornhill to me to hold in trust for him, only it does not make it any the more mine than it did before, you understand, for he can take it back or sell it at his pleasure same as before. . . . In fact, it is just the same as he holds the house, only deeded to me to hold for him." We think that these statements in the writing under date of December 6, 1890, and in the letter of December 4, 1890, constitute a valid and sufficient declaration of trust on the part of Mrs. Mussey. *Arms v. Asmley*, 4 Pick. 71; *Montague v. Hayes*, 10 Gray, 609; *Barrell v. Joy*, 16 Mass. 221; *Urann v. Coates*, 109 Mass. 581; *Faxon v. Folvey*, 110 Mass. 392; *Kendrick v. Ray*, 173 Mass. 305; *Gardner v. Rowe*, 5 Russ. 258.

The plaintiffs contend, however, that the conveyances were made by Mussey with intent to defraud his creditors, that the trust was unlawful in its creation, and that a court of equity will not lend its aid to uphold or enforce it. There are several answers to this contention. In the first place, the presiding justice has not found, and we do not think that it follows from the facts that he has found, that the conveyances made by Mussey constituted a fraud upon the insolvent laws or upon his creditors, or that Mussey had reasonable cause to believe himself insolvent when the conveyances were made. On the contrary, in regard to the last proposition the presiding justice found that at the time of each conveyance if Mussey "could have realized a fair market value on the stocks which were then being carried for him, he could have paid his debts in full, without resorting to or realizing upon the said real estate, although in fact he did not so realize upon them." So far, therefore, as existing creditors were concerned he well may have supposed himself at the time of each conveyance to be solvent, and may have been in fact solvent. At any rate, in view of this finding, it cannot be said that the conveyances were invalid as regarded existing creditors,¹ or in fraud of the insolvent laws. *Bridges v. Miles*, 152 Mass. 249; *Mundo v. Shepard*, 166 Mass. 323; *Jaquith v. Massachusetts Baptist Convention*, 172 Mass. 439. The presiding justice further found that at the time of both of the conveyances "he [Mussey] had

¹ In *Day v. Cooley*, 118 Mass. 524, 527, the court said:—

"This is not a case of voluntary conveyance which would be good against subsequent creditors if not tainted with any fraud. The jury have found that the conveyance to the tenant was made with a fraudulent purpose. The instruction requested is based upon the assumption that the only ground upon which subsequent creditors can impeach a conveyance by their debtor, is that it is made with the specific intent to contract future debts to them and avoid the payment of the same. This is not the law. It is well settled that if a debtor makes a conveyance with the purpose of defrauding either existing or future creditors, it may be impeached by either class of creditors, or by an assignee in insolvency or bankruptcy who represents both. *Parkman v. Welch*, 19 Pick. 231; *Thacher v. Phinney*, 7 Allen, 146; *Winchester v. Charter*, 12 Allen, 606; *Wadsworth v. Williams*, 100 Mass. 126. As it was proved in this case that the grantor had an actual fraudulent design which was participated in by the grantee, it is immaterial whether the demandants are to be regarded as subsequent or existing creditors as to the conveyance."

been losing heavily and was troubled over his financial affairs, and that these conveyances were made by him with the actual purpose and intention of putting said real estate beyond the hazards and risks of the said business in which he was engaged, and to protect it from future creditors, and to secure it for the benefit of himself, and that thereafter he continued in said business until all his property, except such interest, if any, as he had in said parcels of real estate, had been lost." But this finding does not require or warrant the conclusion that the conveyances were fraudulent and void as to future creditors. In order to have that effect it must appear that the conveyances were made with "an intent on the part of the grantor to contract debts, and a design to avoid payment of such debts by the conveyance of his property" (Winchester v. Charter, 12 Allen, 606, 611), and to establish such an intent it is not enough to show that the grantor had a general purpose to secure the property from the hazards of future business and the claims of future creditors. But it must appear that at the time of the conveyance he had an actual intent to contract debts, and a purpose to avoid the payment of them by the conveyance. As already observed, there is nothing in this case which requires or warrants such a conclusion from the finding of the court. Winchester v. Charter and Jaquith v. Massachusetts Baptist Convention, *ubi supra*.

But, further, this proceeding has been instituted on behalf of creditors of Mrs. Mussey, not on behalf of creditors of her husband. It does not appear that he has any creditors, or that, if he has, they are dissatisfied with what has been done. It is well settled that conveyances in fraud of creditors are good as between the parties to them, and, except as to creditors, will be upheld. Stillings v. Turner, 153 Mass. 534; Pierce v. Le Monier, 172 Mass. 508.

In making the conveyance which she did at her husband's request, Mrs. Mussey was only carrying into effect the trust upon which she held the property, and we do not see how her creditors have any just ground of complaint. It is conceded that her assignees can take no better title than she had, and, as we understand it, that her creditors have no right to the property if it was lawfully held by her in trust for her husband.

Declarations made by her as to her title, in his absence and without his knowledge or authority, cannot bind him, and we discover nothing in his conduct which can operate by way of estoppel to prevent him from setting up his right to the property. ?

The result is that we think that the bill should be dismissed.

So ordered.

AULTMAN AND TAYLOR CO. v. OLE A. PIKOP ET AL.

MINNESOTA SUPREME COURT, JANUARY 10-FEBRUARY 17, 1894.

[Reported in 56 Minnesota, 531.]

APPEAL by plaintiff, Aultman and Taylor Co., a corporation, from a judgment of the District Court of Becker County, D. B. SEARLE, J., entered September 20, 1893.

Samuel H. Dalen owned the northeast quarter of Section fourteen (14) T. 148, R. 42, in Becker County. The east half was his homestead, on which he resided with his family. On December 6, 1883, he and his wife Kjerste H. Dalen executed a mortgage on the whole quarter section to Johnson Land and Mortgage Co., a corporation, to secure the payment of \$660 borrowed of it that day by him. On July 30, 1887, Dalen and wife conveyed the land to Anders O. Pikop, the wife's brother, subject to the mortgage, and he and his wife recovered it August 10, 1889, to Dalen's wife, Kjerste H. Dalen.

On November 15, 1888, Kjerste H. Dalen and husband conveyed the land to her nephew, the defendant Ole A. Pikop, subject to the mortgage on which was then due over \$700. He paid off the mortgage December 8, 1888, by making a new one on the land for \$690 to the same Johnson Land & Mortgage Co. On June 19, 1891, the plaintiff recovered a judgment against Samuel H. Dalen and Kjerste H. Dalen for \$441.61 upon a debt incurred prior to the deed to Anders O. Pikop. Execution was issued and returned unsatisfied.

On November 28, 1891, the plaintiff commenced this action against Ole A. Pikop, Samuel H. Dalen, and Kjerste H. Dalen to set aside the deeds claiming they were all made and taken with intent to hinder, delay, and defraud the creditors of Dalen and wife. Ole A. Pikop alone answered. Specific questions of fact were submitted to a jury, and in answer thereto they found the conveyances were made without consideration and to hinder, delay, and defraud the creditors of Samuel H. Dalen; that the east half of the land was his homestead, and worth \$1,800; that the value of the west half was but \$700. The court accepted the verdict and ordered judgment for defendants, dismissing the action on the merits with costs. Judgment was so entered and plaintiff appeals.

Spooner & Taylor, for appellant.

J. W. Reynolds, for respondent.

GILFILLAN, C. J. This case comes within *Baldwin v. Rogers*, 28 Minn. 544 (11 N. W. 77); *Horton v. Kelly*, 40 Minn. 193 (41 N. W. 1031); and *Blake v. Boisjoli*, 51 Minn. 296 (53 N. W. 637), — in which it was held that a creditor is not defrauded by his debtor conveying real estate incumbered beyond its value, and that the conveyance is not void, though made with intent to defraud such creditor, — and must be controlled by those decisions. ... Judgment affirmed.

CANTY, J. I dissent from the opinion of the majority in this action. The decision of the majority requires every one of the following propositions to sustain it:—

To sustain it, it must be held, as a presumption of law: (1) That the mortgage will never be paid. (2) That it will be foreclosed. (3) That the mortgagor will exercise his right to compel the mortgagee to sell the unexempt part of the mortgaged premises first. (4) That such unexempt part, when so sold, will sell for its full value. (5) That such unexempt part will never rise in value during the year between the time of sale and the time of the expiration of redemption. (6) That the judgment creditor will not be able to sell on execution sale any such length of time before the mortgage foreclosure sale as to give the purchaser at such execution sale any beneficial or valuable enjoyment of the premises after the time to redeem from the execution sale has expired, and before the time to redeem from foreclosure sale will expire. (7) It must be further held, as a proposition of law, that the statutory right of a judgment creditor to redeem from the foreclosure of a prior mortgage is not a valuable right, which the courts will either recognize or protect. It seems to me that none of these propositions is good law, or well founded.

It is very seldom that any one ever bids at foreclosure or execution sales, except the creditor at his own sale; and when he bids he takes into consideration the amount of his claim, and the amount of his other security, as much as he does the value of the property on which he bids. A creditor whose security is insufficient will always bid more than one whose security is ample. When one part of the mortgaged premises is a homestead, the other part unexempt, and the amount secured by the mortgage only equals the value of the latter part, the mortgagee will not bid as much for such unexempt part as a subsequent judgment creditor, having no other security, will bid for the same at his own execution sale.

If the premises are not redeemed by the owner, the real bidding takes place between the subsequent lien holders at the time for them to redeem from the sale under the prior lien. But the decision of this court denies this right in many cases such as this, by refusing to declare the subsequent judgment a lien on the unexempt property.

If it is a sufficient defense, in this case, that the unexempt property fraudulently transferred is incumbered for all it is worth, why is it not a sufficient defense in every action brought by a judgment creditor to set aside a fraudulent transfer of property? It should certainly be held that the creditor has a right to try the question of value at a public sale, and not before a jury.¹

¹ Garrison v. Monaghan, 33 Pa. 232, contra. See Mittleburg v. Harrison, 11 Mo. App. 136.

A mortgagor though in embarrassed circumstances may unquestionably surrender the mortgaged property to the mortgagee in satisfaction of the debt if the property is worth no more than the amount of the debt. Williams v. Robbins, 15 Gray, 590;

THE MERCHANTS' AND MINERS' TRANSPORTATION
COMPANY v. BORLAND.

NEW JERSEY COURT OF CHANCERY.

[Reported in 53 New Jersey Equity, 282.]

ON demurrer to bill.

The defendants are the widow and four children of Robert B. Borland, late a resident of this State, who died insolvent July 15, 1893. The complainant is a creditor of the deceased by judgment recovered in the State of New York, and the object of the bill is to compel the defendants to pay complainant's judgment out of certain moneys received by them from certain life insurance companies, in payment of certain policies of insurance taken out by the deceased upon his life for the benefit of his wife and children, the annual premiums upon which were paid by him out of his own moneys mostly after the recovery of complainant's judgment.

The principal question raised by the demurrer is the general one as to the merits of complainant's claim.

More specifically stated, the facts set out in the bill and admitted by the demurrer are as follows: —

On November 11, 1886, complainant recovered in the Supreme Court of New York a judgment against Borland, then a resident of New Jersey, for \$6,309.54, for which amount Borland was then indebted to complainant. No part of this indebtedness has ever been paid, and the whole, with interest, still remains due. Borland died July, 1893, insolvent to the extent of ninety-seven per cent of his indebtedness.

1. In December, 1886, after the recovery of complainant's judgment, Borland procured from the Mutual Benefit Life Association of New York a policy upon his life for \$5,000, in favor of his four children, defendants.

2. On the same day he procured from the same company a like policy for \$5,000, in favor of his wife, Louisa, defendant.

3. In 1886, and after incurring the indebtedness to complainant merged in the judgment, exact date not given, Borland took out a like policy from the Mutual Life Insurance Company of New York for \$30,000, in favor of his wife, Louisa, defendant.

These several policies were subject to the payment of certain annual premiums, the amount of which is not stated in the bill, but it is there alleged that they amount to over \$1,400 a year, and were paid by Borland out of his own means and money up to his death.

4. In the year 1890, exact date not given, Borland took out another policy of insurance upon his life from the Mutual Life Insurance

Credle v. Carrawan, 64 N. C. 422; Cox v. Horner, 43 W. Va. 786. See also Livingston v. Bruce, 1 Blatch. 318; Cox v. Hale, 8 B. R. 562; Catlin v. Hoffman, 9 B. R. 342, where it was held that such a transaction was not a preference.

Company of New York for \$5,000, in favor of his wife, Louisa, the annual premium upon which was \$298, which was paid by him each year until he died, out of his own money and means.

5. In the year 1891, exact date not stated, Borland took out another policy upon his life from the Mutual Life Insurance Company of New York for \$5,000, in favor of his wife, the annual premium upon which was \$308, which was paid by him to the company out of his own money and means each year until he died.

In addition to the foregoing five policies, Borland had taken out, in 1876, from the Mutual Life Insurance Company of New York, a policy upon his life for \$5,000, in favor of his four children above named, the annual premium upon which was \$161, which was paid by him each year up to his death, as well before as after the recovery of complainant's judgment, out of his own means and money.

At his death two of his children were minors, and letters of guardianship of them were granted by the surrogate of Hudson County to his widow, the defendant Louisa.

The bill charges that these annual payments of premiums were so paid by Borland for the purpose of placing so much of his means beyond the reach of his creditors, and for the purpose of defrauding the complainant, and that he during the whole period was insolvent.

The bill further alleges that all these policies have been paid in full — those in favor of Mrs. Borland to her in her own right, those in favor of the children in part to her as guardian and in part to those who were of age.

It further alleges that Borland died testate of a will by which he gave his wife his whole estate and appointed her executrix; that she proved such will before the surrogate of Hudson County, and undertook the burthen of its execution; that he left no real estate whatever, and personal estate to the value of \$1,350 only; that preferred claims against the estate, amounting to \$878, were presented to the executrix, and other claims (whether including complainant's or not is not distinctly stated), amounting to \$13,457.72, have been duly presented, under oath, to the executrix, so that the estate will not pay above three per cent of the general indebtedness, including complainant's claim.

Mrs. Borland is made a party defendant as executrix as well as individually, but no decree is prayed against her as executrix.

Mr. William B. Gillmore, for the complainant.

Mr. Isaac S. Taylor, for the defendants.

PITNEY, V.C. There is no mystery or charm about life insurance. It is not a means of creating wealth, nor yet a contract of mere indemnity as is that of fire and marine insurance. It is, in its most usual form, simply a mode of putting by money for savings. A sum of money is paid half-yearly or yearly, as the case may be, to a corporation, which receives and invests it carefully, and adds to it its yearly earnings, and, in consideration of such payments, agrees to pay

the party insured, or such other person as may be named, a sum certain upon his death. The amount so agreed to be paid is arrived at by taking the age and state of health of the party at whose death the money is to be paid, and estimating how many years he will probably live. This is arrived at by consulting what are called the "Tables of Mortality," viz., an account kept for a great number of consecutive years of the ages at which men and women die, and taking the average of all such ages. By this means the probable number of years any man or woman of a given age and of ordinary health will live may be arrived at with reasonable certainty. Having ascertained this chance of life, the company fixes such an annual rate as will, with accretions, at the time of the death of the party insured, amount to the sum agreed to be paid, together with the cost of investment, care, and so forth. Some of those so insured will live longer and some not so long as the tables indicate they ought to live. The real business of the insurance company, as distinguished from that of any other investment company or ordinary savings bank, is to collect overpayments from those who live beyond the average period — the long-livers — and to pay their proceeds to those who do not live the average period — the short-livers. This distinction, however, does not alter, in legal contemplation, the intrinsic character of the transaction between the insurer and assured, which is that of paying money to-day in expectation of its repayment at a future day, either to the party paying it or to such other person as he or she may name. There is, and can be in law, no difference between the payment by a husband of a stated sum of money at stated periods to an insurance company, upon promise to pay a certain sum at the death of the payer, to his wife, and the deposit by the husband of a like stated sum, at like stated periods, in a savings bank, to the credit of the wife. Both are gifts to the wife, and the money afterwards paid by the savings bank or insurance company, as the case may be, to the wife or her personal representatives, is nothing more than a payment to her of the money previously paid to it by the husband, with its earnings and increase.

The illustration I have used is that of the form of life insurance, so called, in most common use, and it is the one here in question. But the same reasoning applies to the other forms of life insurance. For instance, if the premium — by which is meant the cash consideration paid to the insurer — is paid, as it may be, all at once, in a single down-payment, and the insurer agrees to pay a greater sum at the death of the assured, it is a mere mode of placing a certain sum of money at interest, to be repaid at death, the amount of interest being fixed by the probability of life of the assured.

The case presented, then, is this: A debtor owing a large sum of money upon a judgment, and plainly insolvent, is in receipt from some source, each year, of money and means belonging to himself, over and above what he finds necessary or proper to expend for current expenses, to the amount of about \$1,500, and instead of devoting it to the pay-

ment, *pro tanto*, of his debt, he makes a present of it to his wife and children by the machinery of divers policies of life insurance, with the result that, at his death, he has given his wife in premiums enough to pay his debt, and she has become practically rich at the creditor's expense.

This statement of the case seems to me to decide it. The old maxim that a man must be just before he is generous, applies.

I am unable to discover any principle or well-considered authority upon which such a transaction can be sustained against creditors. To do so would, as it seems to me, be to run counter to principles so well settled and familiar as hardly to require recital. A husband cannot settle money or property in any shape upon his wife while he is indebted. If he attempts it the creditors are entitled to the aid of this court to reach the property so settled, in whatever form it may be found.

The great weight of authority holds that payments on account of life policies for the benefit of another must be considered as made in fraud of creditors. *Davis v. Wace*, 1 Campb. 487; *Skarf v. Souly*, 1 McN. & G. 360; *Jenkyn v. Vaughan*, 3 Drew. 419, 2 Jur. n. s. 901, 25 L. J. Ch. 338; *Stokoe v. Cowan*, 29 Beav. 637, 7 Jur. n. s. 901, 30 L. J. Ch. 882; *Freeman v. Pope*, L. R. 9 Eq. Cas. 206, 5 Ch. App. 536; *Taylor v. Coenen*, L. R. 1 Ch. Div. 636.

The foregoing were all cases of policies taken out in the name and for the benefit of the party whose life was assured, and by him assigned to a beneficiary. But I am unable to perceive any difference between such a case and that of a policy taken out in the first instance in the name and for the benefit of a third party. Take the case of a policy issued in consideration of a single down-payment. If a debtor invests a sum of money in a policy for a certain sum payable to his personal representatives at his death, and then assigns that policy to his wife, that is an indirect mode of making a settlement upon her. If instead of taking the policy payable to his personal representative, he should have it made payable directly to his wife, that seems to me to be making a direct settlement upon his wife. It is, in effect, loaning a sum of money to the insurance company, and taking the contract of the company to repay it with a fixed interest to his wife at his death.

[The Vice-Chancellor here quoted from *Holt v. Everall*, 2 Ch. D. 266, and *Fearn v. Ward*, 80 Ala. 555].

It is hardly necessary to state that it is settled law in New Jersey that all voluntary gifts are conclusively fraudulent and absolutely void as against all existing creditors without regard to the actual intention of the donor. *Haston v. Castner*, 4 Stew. Eq. 697, 701 *et seq.*; *Arnold v. Hagerman*, 18 Stew. Eq. 186; *Gardner v. Kleinke*, 1 Dick. Ch. Rep. 90.

In looking at the American authorities it must be borne in mind that in many of the States the statutory law provides, as in England, the act just referred to, that husbands may insure their lives for the benefit of

their wives or children, or both, and that the wife or child in such case shall be entitled to receive the proceeds of the policy against the creditors of the husband and father. In a few States no limit is placed upon the amount which a husband and father may, in this mode, abstract from his business or earnings and settle on his family. In most of the States, however, the amount is limited, as, indeed, common justice requires it should be, to a sum certain in each year.

In New York — the only State except our own in which, for present purposes, we are interested — it is fixed at \$500 a year.

The only statute in New Jersey is that of February 19, 1851 (Nix. Dig. 1868, p. 548), as amended by the act of 1871 (P. L. of 1871, p. 25; Rev., p. 640). That act before being amended provided: —

"1. It shall be lawful for any married woman, by herself and in her name, or in the name of any third person, with his assent as her trustee, to cause to be insured for her sole use the life of her husband, for any definite period, or for the term of his natural life; and in case of her surviving her husband, the sum or net amount of the insurance becoming due and payable by the terms of the insurance, shall be payable to her, to and for her own use, free from the claims of the representatives of her husband or his creditors; but such exemption shall not apply where the amount of premium annually paid shall exceed \$100.

"2. In case of the death of the wife before the decease of her husband, the amount of the insurance may be made payable, after the death, to her children for their use, and to their guardian, if under age."

As amended, the last clause of section 1 was omitted.

This act is in marked contrast with most of those of other States. That of Massachusetts (Gen. Stat., ch. 58, 62, cited in 99 Mass. 155), provides that "the policy shall be good whether procured by herself, her husband, or any other person." That of Connecticut provides that any policy of life insurance expressed to be for the benefit of a married woman shall inure to her separate estate, but if the annual premiums exceed \$300, the amount of such excess shall go to the creditors of the person paying the premium.

The New York act more nearly resembles ours. In fact, it is precisely like ours until you come to the last clause of the first section of our act as originally enacted. That clause, as above quoted, is: "But such exemption shall not apply where the amount of premium annually paid shall exceed \$100." The New York act, as it now stands, reads:

"But when the premium paid in any year out of the property or funds of the husband shall exceed \$500, such exemption from such claims shall not apply to so much of said premium so paid as shall be in excess of \$500, but such excess, with the interest thereon, shall inure, to the benefit of his creditors." P. L. of N. Y. 1870, ch. 277, cited in *Stokes v. Ammerman*, 121 N. Y. 341, 342.

This statute has been held in New York to warrant the setting aside by a husband of \$500 a year for the benefit of his wife. *Barry v.*

Equitable Life Assurance Society, 59 N. Y. 587, 593. And in *Stokes v. Ammerman*, *supra*, it was held that all beyond \$500 a year must go to the creditors.

Acts of this character are, properly enough, called "exemption laws," and unless some limit is placed upon the amount by them permitted to be annually settled on the wife, they furnish a ready means by which a husband, no matter how much he may owe, may settle all his property upon his wife, to the complete discomfiture of his creditors, and they may well be called statutes whereby fraud is encouraged and ratified. For this reason they should be carefully examined, and when without limit should be strictly construed.

[The Vice-Chancellor held that the New Jersey act did not authorize "the husband to set aside a portion of his property or income to the use of his wife as against his creditors. . . . A contrary result under the New York statute is due to the interpolation therein, in 1858, of the words 'out of the funds or property of the husband.'" He then referred to *Central Bank v. Hume*, 128 U. S. 195, and approved a criticism of it in 25 Am. L. Rev. 185, but distinguished the case on the ground that the court there did not find that a fraudulent intent existed or was necessarily to be inferred from the surrounding circumstances].

The demurrer must be overruled, with the usual consequences.¹

WARREN v. MOODY.

UNITED STATES SUPREME COURT, APRIL 22-MAY 23, 1887.

[Reported in 122 *United States*, 132.]

THIS was a bill in equity filed in the District Court of the United States for the Middle District of Alabama by Frank S. Moody and Richard C. McLester as assignees in bankruptcy of Baugh, Kennedy & Co. and John S. Kennedy against John S. Kennedy, his wife, Mary E. Kennedy, their daughter, Vernon L. Warren and her husband, Edward Warren. The case was heard on the facts in the answers, admitted to be true by stipulation and three depositions. It appeared that John S. Kennedy in 1866, owning property to the value of \$91,408 and owing individual debts amounting to \$3,400 and partnership debts

¹ The cases and statutes bearing on the questions involved in this case are collected and discussed in 26 Am. L. Rev. 185.

In *In re Harrison*, [1900] 2 Q. B. 710, where the husband paid premiums on a policy on his life, taken out by and belonging to his wife after he had become insolvent, it was held that this was not a "settlement" on his wife, voidable under Sec. 47 of the bankrupt act, though that section provides that "'settlement' shall . . . include any conveyance or transfer in property."

of about \$3,000, conveyed land in Alabama to his daughter, as an advancement on her marriage. The value of the land was variously estimated from \$5,000 to \$10,000. In 1876 John S. Kennedy became bankrupt, and this suit was brought to set aside the deed, on the ground that the individual debts and some of the partnership debts owing at the time of the advancement were still unpaid. The bill alleged that the deed was voluntary and that such a deed was absolutely void as against existing debts by the laws of Alabama, but so far as appeared there was no actual intent to hinder, delay, or defraud creditors. The District Court made a decree setting aside the deed, and this was affirmed by the Circuit Court.¹

Mr. John T. Morgan, for appellants.

Mr. M. L. Woods and *Mr. William S. Thorrington*, for appellees.

Mr. Justice BLATCHFORD delivered the opinion of the court.

It will be noticed that the bill does not attack the deed on the ground of fraud. It does not allege that it was made with any intent to delay, hinder, or defraud the creditors named in the bill, or any other creditors of Kennedy. It does not allege that there are any other creditors than those named in the bill, or any creditors who became such after the making of the deed. The sole ground on which it proceeds is, that the deed was a voluntary deed, and is void as against the persons who were creditors of Kennedy prior to the making of the deed. It claims that the plaintiffs, as assignees in bankruptcy, represent the debts of those creditors, for the purposes of the suit.

The alleged right of action of the plaintiffs is asserted under section 14 of the Bankruptcy Act of March 2, 1867, c. 176, 14 Stat. 522, which provides, that "all the property conveyed by the bankrupt in fraud of his creditors" shall, in virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee, and he may sue for and recover the said estate, debts, and effects." This provision is also found in sections 5046 and 5047 of the Revised Statutes.

The deed in question was a valid instrument between the grantors and the grantees. The stipulation on which the case was heard, containing an admission "that the facts set forth in the answers are substantially true, except so far as controverted by the depositions and other evidence in the cause," makes the allegations of fact contained in the answer of Kennedy and his wife evidence in the cause. When the deed was made, Kennedy was, as the answer alleges, in prosperous circumstances, and possessed of ample means to pay all debts, and was able to withdraw the value of the donation to his daughter from his estate without the least hazard to his creditors, and the amount of his individual debts was very small as compared with the amount of his property. The deed to the daughter being honest in fact and in intent, and being, on the evidence, a proper provision for her, as an advancement on the occasion of her marriage, and being valid as between

¹ An abbreviated statement has been substituted for that in the original report.

her parents and herself, and no fraud in fact, or intent to commit a fraud, or to hinder or delay creditors, being alleged in the bill, the case is not one in which these plaintiffs can set aside the deed, as being a deed of "property conveyed by the bankrupt in fraud of his creditors," even though the conveyance may have been invalid, under the statute of Alabama, as against the creditors named in the bill, because it was a voluntary conveyance. These creditors, whatever remedies they may have had to collect their debts, are not represented by the plaintiffs, as assignees in bankruptcy, for the purposes of this suit, on the facts developed.

The case of *Pratt v. Curtis*, 2 Low. 87, cited by the plaintiffs, was a case of two bills in equity by the assignee of a bankrupt to set aside conveyances of land made by the bankrupt, one being a voluntary deed of settlement for the benefit of his children, and the other being a like deed for the benefit of his wife. Each bill alleged that, at the time of the settlement, the bankrupt was indebted to persons who were still his creditors, and was embarrassed in his circumstances, and that the deed was made with intent to delay and defraud his creditors. On demurrer the bill was sustained, on the view that the assignee in bankruptcy, and he only, had the right to impeach the deeds, in the interest of creditors. That decision, based on a case of intent to delay and defraud creditors, on the part of a person embarrassed in his circumstances, has no application to the present case.

*The decree of the Circuit Court is reversed, and the case is remanded to it, with a direction to dismiss the bill, with costs to the defendants in the Circuit Court and in the District Court.*¹

¹ In *Pratt v. Curtis*, 2 Low. 87, 89, Judge LOWELL said: "It is, however, the Statute of 13 Eliz. as adopted and construed in Massachusetts which governs this case." See also *Samner v. Hicks*, 2 Black, 532; *Hill v. Agnew*, 12 Fed. Rep. 230.

In *Schreyer v. Scott*, 134 U. S. 405, 409, the court said: "In determining the rules applicable to such transactions reference should be had not only to the decisions of this court, but also to those of New York, where the parties lived and the transactions took place." And at p. 411: "From these authorities it is evident that the rule obtaining in New York, as well as recognized by this court, is, that even a voluntary conveyance from husband to wife is good as against subsequent creditors; unless it was made with the intent to defraud such subsequent creditors; or there was secrecy in the transaction by which knowledge of it was withheld from such creditors, who dealt with the grantor upon the faith of his owning the property transferred; or the transfer was made with a view of entering into some new and hazardous business, the risk of which the grantor intended should be cast upon the parties having dealings with him in the new business. Tested by these rules, it is impossible to sustain an adjudication, upon the testimony in this case, that the transfer of either the real estate or the bonds and mortgages was fraudulent as against the creditor Vanderbilt."

In *Randolph v. Quidnick Co.* 135 U. S. 457, a suit turning on the validity of an assignment for the benefit of creditors, the court said, at p. 463:—

"But we need not rest upon these considerations alone. The Circuit Court dismissed the bill, on the ground that the Supreme Court of the State of Rhode Island had decided that the first and principal conveyance by the Spragues to their trustee was valid under the State statute. *Austin v. Sprague Manufacturing Co.*, 14 Rhode Island, 464. This ruling it had followed in an earlier case, *Moulton v. Chafee*, 22

SECTION I. (*continued*).

(c) GENERAL ASSIGNMENT FOR CREDITORS.

PICKSTOCK v. LYSTER.

KING'S BENCH, HILARY TERM, 1815.

[*Reported in 3 Maule & Selwyn, 371.*]

ASSUMPSIT for money had and received. Plea, non-assumpsit.

At the trial before RICHARDS, B., at the last Salop assizes, the case was this: the plaintiff being a creditor of one Glover, in January, 1812, sued him for his debt. Glover suffered judgment by default, and a writ of inquiry was executed on the 17th of June following, and on the 25th a *fi. fa.* was delivered to the defendant, the sheriff. But before that day, viz., on the 15th of the month, Glover being insolvent executed an assignment by deed of all his effects to trustees for the benefit of all his creditors; under which deed possession was taken immediately after its execution, but the deed was not signed by any of the creditors. This assignment Glover had been desirous of making, and had actually given instructions for its preparation in the early part of the year, though not until after he had been served with the writ at the plaintiff's suit, and the deed had been prepared, and in it the plaintiff was named as one of the trustees, but it did not appear that was done with his knowledge, and his name was afterwards erased, and that of another creditor substituted. The deed, as it originally stood, contained a clause whereby the trustees engaged to indemnify Glover from his debts, which clause was erased before its execution on the 15th of June; and, on account of this and other erasures, it was suggested that it had better be re-ingrossed, but Glover refused, as much on account of the expense as for fear he should be arrested, saying that he should not be safe another day, and that the plaintiff would take possession of his goods in the mean time. The defendant levied under the

Fed. Rep. 26. Unquestionably, if that conveyance and the transfers immediately following were valid, the complainant's testator took nothing by his purchase.

"It is unnecessary to place our judgment solely upon the decision of the Supreme Court of Rhode Island, in the case cited; and yet it is worthy of most respectful consideration, both because it is a decision of the highest court of the State in which the transactions took place, and also because it reviews all the objections made to the conveyance with clearness and ability. As to the construction of a State statute, we generally follow the rulings of the highest court of the State, *Bacon v. Northwestern Life Insurance Co.*, 131 U. S. 258, and cases cited in opinion; and as to other matters, we lean towards an agreement of views with the State courts, *Burgess v. Seligman*, 107 U. S. 20, 34. So, when the highest court of a State affirms that a conveyance, made by a debtor to a trustee for the benefit of creditors, is valid under the statutes of that State, we should ordinarily, in any case involving the validity of such conveyance, follow that ruling, even though that statute was common to many States, and in others a different ruling had obtained."

A. fa., but retained the proceeds in his hands, for which this action was brought, in order to try the question whether the property passed from Glover by this assignment and delivery of possession. The learned judge directed the jury that if they thought the deed was executed with an intent to defeat the plaintiff of his execution, then it was void in law, and they must find for the plaintiff, but otherwise for the defendant. The jury found a verdict for the plaintiff.

Lord ELLENBOROUGH, C. J. The only thing to raise a doubt in my mind upon the present case would be the authority of Mr. J. Lawrence, under whose direction it is said that a bill of sale executed to a *bona fide* creditor was held not only to have been made under circumstances which carried with them a badge of fraud, but to be evidence of such fraud as warranted him in leaving it to the jury to find against the bill of sale, if it was made in order to defeat another creditor. But I am afraid that if the conveyance in this case be not good, it will break in upon the validity of all judgments confessed by executors, or by the party himself, where either the party or the executor wishing to give a preference to some particular creditor has confessed the same; all judgments also which have been confessed for the actual aggregate amount of the debts due to all the creditors, and with their consent, will be open to this objection. Can any one doubt that the first motive in many of those cases, as well as in this, was to defeat the particular creditor: but at the same time it is not considered as an injury to him, being for the benefit of all the creditors to procure an equal distribution amongst all of the fund to which all have an equal right, against one who has gained the first step upon them. In *Tolputt v. Wells*, 1 M. & S. 395, and in a note which is there given (*Ibid.*, 408), and which was cited by myself, it was considered that an executor might give a preference, and make confession in favor of some creditors pending a suit by another creditor. The principle of those decisions would be destroyed if we should hold an assignment fraudulent because it may operate to the prejudice of a particular creditor. Such an assignment as the present is to be referred to an act of duty rather than of fraud, when no purpose of fraud is proved. The act arises out of a discharge of the moral duties attached to his character of debtor, to make the fund available for the whole body of creditors. Here, if the assignment had been for the purpose of fraud upon the plaintiff, the plaintiff would have been entirely excluded from it, whereas it appears that his name was once proposed and inserted as a trustee. The deed also when executed was not then taken up on the sudden and for the first time, but had been in the contemplation of the debtor for several months before. It is not the debtor who breaks in upon the rights of the parties by this assignment, but the creditor who breaks in upon them by proceeding in his suit. I see no fraud; the deed was for the fair purpose of equal distribution. In the case before Lawrence, J., I cannot help thinking that the deed must have been made in trust for the party himself; otherwise that learned judge, who could not have been ignorant of

Holbird v. Anderson, must have felt the weight of it, unless there was some such distinction. If that were not so, I cannot agree that what he ruled was according to the law. The uniform practice has been otherwise, particularly in the case of executors, which is *in pari materia*, and also in the case of Holbird v. Anderson.

*Rule absolute.*¹

RUSSELL v. WOODWARD.

MASSACHUSETTS SUPREME JUDICIAL COURT, 1830.

[Reported in 10 Pickering, 408.]

REFLEVIN. At the trial, before MORTON, J., it appeared that the defendant, a deputy sheriff, had taken the property replevied, on a writ of attachment in favor of Dan Wilmarth against Nathaniel Wheeler, the property at the time of the attachment being in the actual possession of Wheeler.

The plaintiffs (who were four in number) claimed the property by virtue of a prior assignment made to them by Wheeler, by an indenture between Wheeler of the first part and the plaintiffs of the second part. By the indenture, Wheeler, in consideration of the covenants on the part of the plaintiffs therein contained, assigns to the plaintiffs certain real and personal estate and closes in action, in trust to sell and dispose of the same or such part thereof as they may see fit, at such times and on such terms and at such prices as may seem to them most expedient, and out of the proceeds, after deducting necessary expenses and a reasonable compensation for their own labor, to pay all and every of the creditors of Wheeler, in ratable proportion to the debt of each, without preference, so far as the funds will go, and the surplus, if any, to hold to Wheeler's use;— and the plaintiffs accept the trust, and covenant, each for himself, that they will faithfully execute the trust, and that Wheeler shall be permitted to use and occupy the property so conveyed, committing no waste thereon, until such time as the same shall be sold or disposed of in the due execution of the trust.

The indenture was recorded in the registry of deeds, on the day of its date.

It was objected that the assignment was void for want of consideration, and on account of the clause which permitted Wheeler to remain in possession of the property until the plaintiffs should take possession thereof to execute the trust; but the objections were overruled.

It was also objected, that the assignment was fraudulent, inasmuch as the plaintiffs had not proved that they were creditors of Wheeler:

¹ LE BLANC, BAYLEY, and DAMPIER, JJ., delivered brief concurrent opinions.

For many decisions in accord with Pickstock v. Lyster, see Am. & Eng. Encyc. of Law (2d ed.), 393, n. 3 and 4. But see Dalton v. Currier, 40 N. H. 237.

whereupon evidence was given that Russell and Vickery, two of the plaintiffs, were creditors at the date of the assignment, though the amount of their debts was small in comparison with the property assigned; but the judge suggested that the burden of proof on this point was upon the defendant.

The jury found a verdict for the plaintiffs. If either of the foregoing directions and decisions was incorrect, a new trial was to be granted.

W. Baylies, and W. A. F. Sproat, for the defendant.

C. G. Loring, for the plaintiff.

The opinion of the court was afterwards drawn up by

SHAW, C. J. Were the validity, effect, and operation of a trust assignment, made by a failing debtor, for the avowed purpose of providing for the disposition of his property, and making a ratable distribution of the proceeds among his creditors, upon general principles of law, equity, and expediency, so far as a court of law can properly take into view considerations of expediency, now for the first time drawn in question, the able argument of the plaintiff's counsel maintaining the ground, that the assignment in question vested the whole of the assigned property in the assignees, so as to bind all creditors and bar the right of attachment, whether the creditors generally, or creditors to any particular amount, had become parties to it or not, would certainly be entitled to great consideration. But this court is not now at liberty to regard these as open questions. In the absence of a general bankrupt law, a series of judicial decisions has taken place upon this subject, extending over a period of nearly thirty years, founded upon the principles of law and equity, and the nature and extent of remedies as they existed at the time of these respective decisions, by which a system of rules of conduct and action, especially among the trading community, has been established, at least so far as such system can be established by judicial decision and precedent. Under this system, and in reliance upon it, contracts and transfers have been made, rights and remedies acquired, to a large extent; and it would be inconsistent with the plain principles of justice now to disturb them, or to change the law, in any other mode than by a legislative act, which should look only to the future, and guard by adequate provisions, all acquired and existing rights.

This system recognizes the right of a creditor to attach the personal property of his debtor on mesne process, and to hold it as security for such judgment as he may recover, being a right founded upon early colonial laws, and uniformly practised upon in this Commonwealth. It also recognizes the right of a debtor to give a preference to one or more of his creditors; and by agreement with him or them, to transfer a portion or the whole of his property to them in satisfaction of a subsisting debt, or as an indemnity against a subsisting suretyship or other liability. Such property may consist either in real or personal estate, or securities, or choses in action.

It is but a slight extension of this rule, that as the debtor may convey property to one or more of his creditors, in satisfaction of their debts, so he may convey to a third person, appointed by such creditors and for their use, or appointed in the first instance by the debtor, if the creditor afterwards assent to and ratify such appointment. Or the assignee may stand in both characters, acting for himself to the extent of his own debt, and as a depositary and trustee for others, by their appointment or assent.

But if under a pretence of a conveyance for the benefit of creditors, the debtor transfers his property upon any secret trust for himself, if it is attended with any of the known badges of fraud, not satisfactorily explained or removed, the conveyance is void at law. As the transaction imports upon the face of it, that the grantor is insolvent, any voluntary or gratuitous conveyance or conveyance without an adequate consideration, is void as against creditors.

From these views of the law, as settled by a series of decisions, it is manifest, that in order to maintain a conveyance to trustees, by a failing debtor, for the benefit of creditors, against an attachment of a creditor not a party to such assignment, it must appear that the assignment was made upon a valuable and adequate consideration, and in good faith, to satisfy or secure real existing debts, or to indemnify against actual and subsisting liabilities; and as it appears, by the recitals and terms of such assignment, that the grantor is insolvent, and that no actual consideration in money or other equivalent is paid by the grantees, such consideration must consist in the faithful application of the assigned property to the payment and discharge, in part or in whole, of the assignor's debts and liabilities, or in an acceptance of the same in satisfaction, by the creditors and sureties to whom or to whose use it has been conveyed; it must appear that such conveyance has been accepted in payment or satisfaction, by such creditors and sureties, in order to make such transfer complete and available against attaching creditors.

It has been argued in the present case, that as the assignment does not in terms require the creditors, by becoming parties to it, to release their debts, or take upon themselves any other onerous condition, and as the assignment must of necessity therefore operate as a benefit to them, their assent is to be presumed. But the court are strongly inclined to the opinion, that this circumstance of not executing a release, makes no substantial difference, and therefore that in conformity to a series of decisions, it must be held, that the assignment of the whole or the bulk of an insolvent debtor's property, to assignees selected wholly by himself, and without the knowledge of the creditors, in trust to dispose of the same upon such terms as the debtor alone thinks fit to impose, and to distribute the proceeds among the creditors, does not appear to be so plainly beneficial to them as to come within the principle relied upon in the argument, upon which their assent is to be presumed. It must be considered that by assenting to and affirming such

assignment, the creditors do in effect consent that the whole of such insolvent's available property, instead of being applied to the satisfaction of their debts, according to the rules of law, and under the direction of the creditors themselves, shall go into the hands of a stranger, appointed by the debtor, and under his direction. We think it would be difficult to presume without proof, that the creditors have assented to an arrangement which thus defeats their legal remedies, especially against a creditor, who by bringing his suit and attaching the property, has expressed his dissent from and disaffirmance of the assignment.

But this point does not necessarily arise in the present case. It does not appear that there were creditors whose debts would be sufficient to absorb the assigned property, even if their assent, without their becoming parties, could be presumed. It appeared in evidence, that a large amount of property was assigned, and that the amount due the assignees, and those whom they represented, was small. In this state of the evidence, it was ruled, that the burden of proof was upon the defendant to impeach the consideration, as being fraudulent against creditors. Such is undoubtedly the rule, in ordinary cases of the conveyance of property, impeached on the ground of being intended to delay or defeat creditors and fraudulent upon that ground.

But for the reasons before stated, a different rule prevails where the assignment, on the face of it, purports to be made by an insolvent debtor to trustees, for the use of creditors, and where the conveyance does not purport to be made upon consideration of money paid. There we think the burden of proof is upon the assignees to show an adequate consideration for the assignment. What is an adequate consideration, depends upon such circumstances which may be extremely various, and in regard to which it is not now necessary to express any opinion.

The court are all of opinion, that in the state of the proof upon the trial of this cause, the suggestion from the court, that the burden of proof was upon the defendant, and that the plaintiffs as assignees were under no necessity of proving the existence of their own debts or of the debts of other creditors, as a consideration for the assignment, was incorrect, and therefore that there must be a new trial.¹

¹ In England it is requisite that one or more of the creditors assent expressly or by implication. Until then the deed is regarded as revocable for the assignor it is held, "is merely directing the mode in which his own property shall be applied for his own benefit." Garrard v. Lauderdale, 3 Sim. 1, 12. But in this country, except in Massachusetts, assent of creditors is not necessary to the validity of an assignment. Burrill on Assignments (6th ed.), §§ 256-268.

Assignments frequently contain provisions requiring creditors to assent within a specified time. If the time is reasonable such a provision is valid. Burrill, § 186.

GARDNER v. COMMERCIAL NATIONAL BANK OF
PROVIDENCE.

ILLINOIS SUPREME COURT, MAY 18, 1880.

[Reported in 95 Illinois, 298.]

MR. JUSTICE SCHOFIELD delivered the opinion of the court.

? Although the deed of assignment was executed in Rhode Island, yet its validity and effect, as an instrument for the conveyance of real estate located here, must be determined by our law. Story's Conflict of Laws, § 864; Rorer on Inter-State Law, pp. 139, 204; Cutter v. Davenport, 1 Pick. 81; Osborne v. Adams, 18 Pick. 245; Hartford v. Nichols, 1 Paige, 220; Chapman v. Roberts, 6 Paige, 627; Wills v. Cowper, 2 Ham. 124; Loving v. Paire, 10 Iowa, 282.

The deed of assignment recites that, "whereas, the said Sackett, Davis & Co. are indebted to divers persons in divers sums of money, and their assets, although amounting in value to about three times their said indebtedness, cannot immediately be made available for the payment of the same," etc. And it empowers the trustees, in their discretion, "to carry on the said jewelry business, of the parties of the first part, for such time as the said trustees may deem for the best interests of the creditors, and necessary for the purpose of preventing shrinkage and loss, and of closing out and liquidating the same to the best advantage." In this feature the case is analogous to Van Nest v. Yoe *et al.*, 1 Sandford Ch. 4, where, in a very well-reasoned opinion, the Vice-Chancellor held the deed of assignment void, as tending to hinder, delay, and defraud creditors.

The placing of the property in the hands of assignees for any other purpose than to enable them to distribute it or its proceeds among creditors, must necessarily have the effect to, in some degree, hinder and delay creditors in the collection of their debts. And when the assignor has, or thinks he has, more property than is necessary to pay his debts, the assignment can only be presumed to be intended for his own benefit, for, in that contingency, he alone is to be profited. In the case referred to it is cogently said by the Vice-Chancellor: "No assignment was ever made by a debtor who supposed himself to be solvent, with a view or for the purpose of selling and converting his property into money more speedily than it could be done by process of law. If such were his design, he would effect it himself without the intervention of an assignee. The real object is to gain time — to prevent the speedy sale and conversion which an execution would inevitably accomplish." And, again, he says: "The debtor who, believing himself more than solvent, places his property beyond the reach of the process of the law, whatever may be the pretence under which he cloaks the act, in the language of the Statute of Frauds, 'hinders' and 'delays,'

and ultimately defrauds his creditors. It is no answer to this argument to say that the debtor provides an ample fund for the payment of the debt, and that the creditor is ultimately to be paid in full. The law gives to the creditor the right to determine whether his debtor shall have further indulgence, or whether he will pursue his remedy for the collection of the debt. The deferring of payment is, generally, an injury to the creditor, and he may be overwhelmed with bankruptcy for the want of the fund which is locked up by the voluntary assignment of his debtor. It is mockery to such a creditor to say that the assignment is made for the benefit of creditors." See also, to the same effect, *Kellogg v. Slawson*, 15 Barb. 56.¹

Manifestly, the carrying on the jewelry business, in view of the assignors' supposed solvency, "for such time as the trustees may deem . . . necessary for the purpose of preventing shrinkage and loss, and of closing out and liquidating the same to the best advantage," could only be designed to prevent a sacrifice of the assignors' property and business that would result from the enforcement of the payment of their debts by the ordinary process of law; and this, as well as the further clause in the deed of assignment authorizing them to "make, sign, indorse, and guarantee any and all bills of exchange, promissory notes, or other commercial paper, . . . for any new indebtedness or liability which may be contracted in so carrying on said business," and to lease or mortgage the real estate, etc., clearly vests power in the trustees to hinder, delay, etc., the creditors in the collection of their debts. They are not compelled, unless upon a request of a majority of the creditors, to close out and make final settlement of the business, at any particular time. Their judgment of what is "for the best interests of the creditors, and necessary for the purpose of preventing shrinkage and loss, and of closing out and of liquidating the same to the best advantage," is to control. And, although it might appear as clearly as anything could, that the "best interests of the creditors" required the business to be closed up, still, this alone is not sufficient, for they

¹ Affirmed in 11 N. Y. 302. In accord are *Higby v. Ayres*, 14 Kan. 331; *Holmberg v. Dean*, 21 Kan. 73; *German Ins. Bank v. Nunes*, 80 Ky. 334; *Baldwin v. Buckland*, 11 Mich. 389; *Angell v. Rosenbury*, 12 Mich. 241; *Gere v. Murray*, 6 Minn. 305; *First Nat. Bank v. Hughes*, 10 Mo. App. 7; *Knight v. Packer*, 1 Beas. 214; *London v. Packer*, 7 Jones L. 313; *Gardner v. Commercial Nat. Bank*, 13 R. I. 155. See also *Malvin v. Wert*, 19 Fed. Rep. 721; *Guerin v. Hunt*, 8 Minn. 477; *North Ward Nat. Bank v. Conklin*, 51 N. J. Eq. 7; *Livermore v. Northrup*, 44 N. Y. 107. The Missouri and Rhode Island decisions were upon the same assignment as that in *Gardner v. Commercial Nat. Bank*.

But see *contra*, *Hunter v. Ferguson*, 3 Colo. App. 287 (statutory); *Munson v. Ellis*, 58 Mich. 331; *Ogden v. Peters*, 21 N. Y. 23. In *Munson v. Ellis*, the court said: "A person, whether insolvent or not, may legally execute a conveyance of his property to a trustee or assignee to pay his indebtedness, if he have any. Such conveyance would not be void upon its face, nor intrinsically so. Creditors could attack its validity upon the ground that it was made with intent to hinder, delay, and defraud them, and unless they could establish such intent the assignment would be valid." See also *Savery v. Spaulding*, 8 Ia. 239; *McCandless v. Hazen*, 98 Ia. 321.

are also to have in view, before acting, what is "necessary for the purpose of preventing shrinkage and loss," etc., etc.

Nor does there appear any limitation upon the trustees, other than what their own judgments may impose, to prevent their incurring new debts in the business, and incumbering the property to its full value for their payment, indefinitely in the future, or to prevent their exhausting the property assigned in the payment of such debts. They have power to carry on the business, to create debts, and give notes, etc., therefor, and to sell and convey and mortgage the real estate.

But we have frequently held that a debtor is only allowed to place his property beyond the reach of his creditors by making a general assignment of all his property, when he does so for the benefit of the creditors, by devoting it fairly to the payment of his debts, and not with a view to his own advantage. *Neshitt et al. v. Digby et al.*, 13 Ill. 387; *Phelps et al. v. Curts et al.*, 80 Ill. 113; *Hardin v. Osborne*, 60 Ill. 93.

To make such a deed valid the debtor's property must be unconditionally and without restriction transferred to the assignee, with a general authority to him to receive, hold, and dispose of it for the equal benefit of all the creditors in the order of preference, if any, provided for. *McIntire v. Benson*, 20 Ill. 500.

In *Vernon v. Morton et al.*, 8 Dana (Ky.), 263, the court says: "If the intention in executing the deed be to hinder and delay creditors, it will vitiate the whole deed, though it be made upon a good consideration, or for the just and equitable purpose of securing an equal distribution of the effects among all the creditors." And again: "When it appears on the face of a deed of trust that the motive for making it was to prevent a sacrifice of the property, a bad motive is shown, — a motive to obstruct the ordinary process of law, or the subjection of the

¹ Such provisions render an assignment fraudulent. *Owen v. Body*, 5 A. & E. 28; *Spencer v. Slater*, 4 Q. B. D. 13; *Hill v. Agnew*, 12 Fed. Rep. 230; *Stafford Nat. Bank v. Sprague*, 17 Fed. Rep. 784; *Webb v. Armistead*, 26 Fed. Rep. 70; *De Wolf v. A. & W. Sprague Mfg. Co.*, 49 Conn. 282; *Jones v. Syer*, 52 Md. 211; *Gere v. Murray*, 6 Minn. 305; *First Nat. Bank v. Hughes*, 10 Mo. App. 7; *Dunham v. Waterman*, 17 N. Y. 9; *Peters v. Light*, 76 Pa. 289; *Gardner v. Commercial Nat. Bank*, 13 R. I. 155; *Lowenstein v. Love*, 16 Lea, 658; *McCormack v. Bignall*, 1 Tex. Civ. App. § 760; *Landeman v. Wilson*, 29 W. Va. 702. See also *Bernard v. Barney Myroleum Co.*, 147 Mass. 356.

But a provision authorizing the continuance of business so far as is necessary to dispose of the property on hand, or to work up raw material on hand, is generally held valid. *Janes v. Whitbread*, 11 C. B. 406; *Coates v. Williams*, 7 Ex. 205; *Talley v. Curtain*, 54 Fed. Rep. 43; *Rankin v. Lodor*, 21 Ala. 380; *De Forest v. Bacon*, 2 Conn. 633; *Kendall v. New England Carpet Co.*, 13 Conn. 383; *Christopher v. Covington*, 2 B. Mon. 357; *Woodward v. Marshall*, 22 Pick. 468; *Mattison v. Judd*, 59 Miss. 99; *Anderson v. Lachs*, 59 Miss. 111; *Robbins v. Butcher*, 104 N. Y. 575 (distinguishing *Dunham v. Waterman*, 17 N. Y. 9, which seems *contra*); *Stoneburner v. Jeffreys*, 116 N. C. 78; *Rindskoff v. Guggenheim*, 3 Coldw. 284; *Marks v. Hill*, 15 Gratt. 400; *Williams v. Lord*, 75 Va. 390. See also *Nat. Union Bank v. Copeland*, 141 Mass. 257. Some of these cases seem, on their facts, inconsistent with some of those in the first paragraph.

property to the payment of the debts, which vitiates the whole deed." To the same purport is, also, *Ward v. Trotter*, 3 Monroe, 1.

So, we have held a deed of assignment void because of a clause therein authorizing the sale of the goods and property assigned on a credit. *Bowen v. Parkhurst*, 24 Ill. 257; *Pierce v. Brewster*, 32 Ill. 268; *Whipple v. Pope*, 33 Ill. 334.

The principle applicable here is precisely the same as in the last-mentioned cases. There the sale on credit was prohibited because it would involve the tying up of the assets, and hence compel a hindrance, delay, and postponement of the claims of creditors. But if the property may be held until new debts are incurred and then mortgaged to secure their payment, or sold and the proceeds devoted to their payment, it is equally clear that the creditor is hindered, delayed, and postponed in the collection of his debt.

The suggestion that, as to such new debts, the trustees would only bind themselves, is entirely outside of the language of the deed of assignment. It indirectly but clearly recognizes the right of the trustee to make new debts, which shall become charges upon the property, and by necessary implication to secure the same by mortgage, or pay the same out of sales of the property, and it is by its own terms that, so far as affects the question under consideration, it must stand or fall.

It is not necessary that we should, at present, question the right of a failing debtor, in his deed of assignment, to authorize his assignee to continue to carry on the business to which the assigned property has been devoted, when this is limited to disposing of the stock on hand, and such incidental business as may be reasonably requisite thereto. But this business is not thus limited. The deed here authorizes the trustees to carry on the business generally, for which purpose they are invested with "full and uncontrolled power, in their discretion," and the only attempt at limitation is that in respect of the time which the business may be carried on, which we have before commented upon.

And this distinguishes the cases referred to and relied upon by counsel for appellants from the present case. None of them sanction the

¹ *Muller v. Norton*, 19 Fed. Rep. 719; *Stadler v. Carroll*, 19 Fed. Rep. 721; *Richardson v. Rogers*, 45 Mich. 591; *Bennett v. Ellison*, 23 Minn. 242, 252; *Brahmstadt v. McWhirter*, 9 Neb. 6, 9; *Rapalee v. Stewart*, 27 N. Y. 310, *Beuss v. Shaughnessy*, 2 Utah, 492 (*conf.* *Sprecht v. Parsons*, 7 Utah, 107); *Page v. Olcott*, 28 Vt. 465, 468; *Haines v. Campbell*, 8 Wis. 187 (*conf.* *Cribben v. Ellis*, 69 Wis. 337), *acc.*

Janes v. Whitbread, 11 C. B. 406; *Wright v. Thomas*, 1 Fed. Rep. 716; *Re Walker*, 18 N. B. R. 56; *England v. Reynolds*, 38 Ala. 370, *Wilhoit v. Lyons*, 98 Cal. 409; *Petrikín v. Davis*, *Morris (la.)*, 296, 300; *Farquharson v. Eichelberger*, 15 Md. 63; *Richardson v. Marqueze*, 59 Miss. 80; *Baum v. Pearce*, 67 Miss. 700; *Moore v. Carr*, 65 Mo. App. 64; *Meyer v. Black*, 4 N. Mex. 190, *Stoneburner v. Jeffreys*, 116 N. C. 78; *Conklin v. Coonrod*, 6 Ohio St. 611; *Gimell v. Adams*, 11 Humph. 283; *Moody v. Carroll*, 71 Tex. 143; *Dance v. Seaman*, 11 Gratt. 778, 781, *contra*.

A provision requiring or permitting postponement of the sale of the trust property does not vitiate the assignment if such delay is not more than is reasonably necessary for a favorable liquidation of the property. A provision allowing greater delay is void. 14 Am. & Eng. Encyc. of Law (2d ed.), 406.

doctrine that trustees may be invested with "full and uncontrolled power" to carry on business. Nor could a doctrine, so at variance with reason, receive our sanction, even if announced by respectable courts.

The court below properly held the deed void as against creditors, and its judgment must therefore be affirmed.

Judgment affirmed.

GROVER v. WAKEMAN.

NEW YORK COURT FOR THE CORRECTION OF ERRORS, DECEMBER, 1833.

[Reported in 11 Wendell, 187.]

SUTHERLAND, J. The question to be decided in this case is whether the assignment made by Grover and Gunn, on the 1st day of July, 1826, is fraudulent and void upon its face, as being calculated and intended, in judgment of law, to delay, hinder, and defraud their creditors, in the prosecution and collection of their debts. The most important objection made to the assignment grows out of the condition attached to the payment of the creditors named in class No. 2. The assignees are directed, after discharging the debts due to class No. 1, to apportion whatever surplus may remain, among such of those named in class No. 2 as will agree in writing under seal to receive what may fall to them upon such apportionment, in full discharge of all their claims and demands upon the assignors. The residue of the avails, if any, are then to be applied to the payment of the debts due to the debtors in class No. 3, and of all other debts justly due and owing by the assignors, to be proven to the satisfaction of the assignees; and if any surplus shall then remain, it is to be paid over to the assignors.

It was contended by the complainant in the court below, the respondent here, that such of the creditors in class No. 2 as shall refuse to come in and discharge the assignors, upon the terms there offered them, are entirely excluded from all benefit from the assignment; that if there should be a surplus after paying all the other creditors, according to the terms and spirit of the instrument, the assignees could not pay it to them, but must pay it to the assignors themselves. Upon a careful consideration of this instrument, and applying to it the ordinary rules of interpretation, I do not think that such is its necessary or just construction. The debts of the first class are first to be paid; then an apportionment is to be made among the debts of such of the second class as will accept what may then fall to them, and give absolute releases. The residue, if any, is then to be applied to the debts of class No. 3, and to all other debts justly due and owing by the assignors. Other than what? why, obviously, other than those for the payment of which provision had already been made. But no provision had been

made for those of class No. 2, who should refuse to accept their distributive shares and give releases. They fall, therefore, in my opinion, within the terms of the residuary clause, and would be entitled to be paid under the assignment, if the fund should be sufficient for that purpose. A fraudulent intent is never to be presumed; and where an instrument is ambiguous in its terms, and admits of two constructions, that interpretation should be given to it which will render it legal and operative, rather than that which will render it illegal and void. It was supposed that the provision that these residuary debts should be proven to the satisfaction of the assignees tended to show that none of those enumerated in class No. 2 could have been intended to be covered by the residuary clause, because the assignors had, on the face of the assignment, admitted those to be valid and existing debts; and of course, if those were the debts intended to be covered, they would not have imposed on their assignees the useless duty of exacting and receiving proof in relation to them. This suggestion is susceptible of two answers. In the first place, there may have been many other debts not enumerated, and in relation to which it would have been necessary and proper to require proof; and in a provision of this description, a party would naturally employ general and comprehensive terms, although they might embrace some cases in relation to which the provision was superfluous. But, secondly, upon adverting to the schedule, which contains class No. 2, it will be perceived that many of the debts there enumerated are stated by estimation only. Of the \$34,000 embraced in that class, more than one fourth, or about \$9,000, are debts of that description. In relation to them, it was proper and necessary to exact proof, as there was no liquidation or admission of their amount; and in relation to those that were specifically stated in the schedule, the schedule itself would probably be sufficient evidence to justify the assignees in receiving them. I entertain no doubt, therefore, that under this assignment, such of the creditors of the second class as should refuse to accept their shares of the property assigned in full satisfaction and discharge of their debts were not absolutely excluded from the benefit of the assignment, but only postponed to a subsequent class.¹

Having thus settled the character and construction of the assignment, the question recurs, whether it is void on account of the condition on which it makes the preference given to the creditors of the second class to depend, to wit, an absolute discharge of their debts. It is perfectly settled, both in England and in this country, that a debtor in failing circumstances has a right to prefer one creditor or set of creditors to another, in all cases not affected by the operation of a bankrupt system. He may assign the whole of his property for the

¹ If such creditors were absolutely excluded, the assignment would almost universally be held fraudulent, as the result would be to reserve a possible surplus for the debtor to the exclusion of non-assenting creditors. Burrill on Assignments (6th ed.), § 164.

benefit of a single creditor, in exclusion of all others; or he may distribute it in unequal proportions, either among a part or the whole of his creditors.¹ No matter how or upon what principles the distribution is made, if the debtor devotes the whole of his property to the payment of just debts, neither law nor equity inquires whether the objects of his preference are more or less meritorious than those for whom he has made no provision. 3 Maule & Selw. 371; 4 Mason, 210; 5 T. R. 235; 6 T. R. 152; 8 T. R. 521; 4 East, 1; 2 P. Wms. 427; 1 Atk. R. 95, 154; 2 Johns. Ch. R. 283; 3 Johns. R. 71; 5 Johns. R. 382; 1 Binn. 502; 18 Mod. 489; 5 T. R. 424; 15 Johns. R. 583; 5 Cowen, 547. The right to prefer may originally have been sustained in part upon the supposition that just and proper grounds of preference did in most cases exist, and would be duly regarded by the debtor; but whatever may have been the reason or foundation of the rule, it is one of that numerous class of cases in which the rule has become absolute, without any regard to the fact whether the reason on which it was founded exists or not in the particular cases. It is now too late to agitate the question, whether these assignments, either partial or general, are sustained by considerations of true wisdom and policy. Reflecting men have differed upon that subject; but the better opinion seems to be, that in the absence of a general bankrupt system, the interests of a commercial community require that they should be sustained. They have accordingly grown into use, and have been sanctioned by judicial decisions in most of the States of the Union. They have become thoroughly incorporated into our system; and all that it is now competent for our courts to do, is to see that they fairly appropriate all the insolvent's property, or such portion of it as he undertakes to assign, to the payment of his just debts, and are not made the instruments of placing it beyond the reach of his creditors, and for the benefit, either immediate or remote, of the insolvent himself. Whenever they depart from the simplicity of a direct and unequivocal devotion of the property of the assignor to the payment of his debts, and contain reservations and conditions, intended for his ease and advantage, they are viewed with considerable, and I think I may add, in view of the course of judicial decisions in this State, with increasing distrust.

¹ Assignments with preferences, though generally held valid at common law, Huntley v. Kingman, 152 U. S. 527, 532, have been forbidden by statutes in most States, but are still allowed, apart from the National Bankruptcy Law, in Arkansas, Georgia, Indian Territory, Mississippi, Montana, New York (only to the extent of one third of the estate), North Carolina, Utah, Virginia. In some of the States where assignments with preferences are not allowed the debtor may, however, subject to the possibility of a petition in bankruptcy, give a preference by actual payment or transfer of part of his property, and immediately thereafter make a general assignment of the remainder. See e. g. Cross v. Carstens, 49 Ohio St. 543, and conf. Huey v. Prince, 187 Pa. 151. Where assignments with preferences are not permitted, the effect of such assignments is not everywhere the same. In some jurisdictions the assignment is treated as a fraudulent conveyance; in others it takes effect as if made without preferences; in others it merely afforded ground for proceedings under State insolvency laws now suspended.

The precise question now presented to us has never been decided in this State. In *Hyslop v. Clarke*, 14 Johns. 458, *Austin v. Bell*, 20 Johns. 442, and *Seaving v. Brinckerhoff*, 5 Johns. Ch. R. 329, it arose in connection with other circumstances which had more or less influence in the decision of those causes. *Hyslop v. Clarke* was an action of trespass, brought by the assignees of Barnet and Henry against a judgment creditor of the assignors, who had caused an execution to be levied upon their property notwithstanding the assignment. The plaintiff claimed the property under the assignment, and the defendants contended that the assignment was void, and did not pass the property out of the assignors. The trusts declared in that case were, (1) To pay a certain debt due to the assignees; (2) To pay all the other creditors of the assignors in full, if the property should be sufficient; if not, then ratably, provided they should severally and respectively discharge the assignors from all further liability for their debts; but if the creditors or any of them should refuse to give such discharge, then the second trust was to become void, and the trustees were directed not to execute it. They were, then, 3dly, after paying the debt of *Hyslop & Co.*, the assignees, to hold the residue in trust to pay the whole of the avails to such of the creditors of the assignors as they should appoint, as soon as such refusal should be known to them; and (4) To pay the residue to the assignors. Here, as was remarked by Judge Van Ness, the assignment did not actually give a preference to any of the creditors, except *Hyslop & Co.*; but it was an attempt on the part of the debtors to place their property out of the reach of their creditors, and to retain the power to give such preference at a future time, upon their own terms and conditions. The trust for the benefit of all the creditors ceased whenever any one of the creditors refused to come in on the terms prescribed, and the property was then held in trust for the assignors themselves; and as the creditors could not reach it at law, if the assignment was valid, so Judge Van Ness held that they could not effectually reach it in equity. For if any one should file a bill to compel the assignors to make a new declaration of trust, as the power reserved was to select whom they pleased, if a decree should be made ordering a new declaration, the assignor might exclude the very creditor who had filed the bill. Under such circumstances, no creditor would ever file a bill. That assignment, then, differed from the one now under consideration in two essential particulars: (1) It reserved to the grantor a right subsequently to control the property by appointing new uses; and (2) the power of any one creditor effectually and beneficially to compel such declaration was exceedingly doubtful, if not impossible. The weight which these circumstances had in the decision of the cause may be subsequently considered. The case of *Murray v. Riggs*, 15 Johns. R. 571, shows that the control over the property which the assignor there reserved was of itself sufficient to avoid the deed. In *Austin v. Bell* the assignment contained a reservation of \$2,000 per annum for a limited time to the assignor. It also exacted

from the creditors who were to be benefited by it a general release; and it then provided that if any of the creditors named should not within a limited time become parties to the assignment, and thereby discharge the assignor, that the assignees should then pay to the assignors the proportion which would otherwise have gone to such creditors; and it was on this ground principally that the assignment in that case was held void. The provision for the grantors themselves was then supposed to have been sanctioned by the court in *Murray v. Riggs*; and Ch. J. Spencer put his opinion mainly on the ground that by the provision of the assignment the shares of such of the creditors as should refuse to execute it were to revert to the grantors for their own private benefit and use. In *Seaving v. Brinckerhoff* the assignment also contained the condition that the creditors who should come in under it should give a full discharge of their demands; and if any of them refused, their shares were to be held in trust for the grantor. Chancellor Kent laid great stress in that case upon the fact that the assignment did not embrace all the property of the assignor, and yet exacted a release from his creditors upon a partial payment; he says the condition was oppressive and without any color of justice in this case, inasmuch as the assignment was not general of all the property, but only of a specified part; a partial assignment upon such a condition is pernicious in its tendency if it be not fraudulent in its design; and in relation to the resulting trust, he remarked that a power of coercion over the creditor, with the reservation of such a resulting trust to the grantor in case the coercion should not be successful, was deemed by the Supreme Court, in *Hyslop v. Clarke*, to be a badge of fraud and not a fair and lawful assignment.

But although it is not adjudged in any of these cases that an assignment is fraudulent and void, which merely makes the preference given to creditors to depend upon their releasing the grantor, but which at all events devotes the whole property to the payment of his debts without any reservation for his own private benefit; still, it cannot be contended that they sanction, with anything like the authority of a judgment, the contrary doctrine. I am inclined to think that the weight of professional opinion in this State has been in favor of the validity of such assignments; but that, so far as it depends upon our own adjudications, the question is still open, and may now be settled by this court upon principle.

Very few cases are to be found upon this subject in the English books; and whenever the question has arisen there, it has generally been upon composition deeds, to which the creditors were parties; or has been more or less affected by considerations growing out of their bankrupt system. 4 T. R. 166; 8 T. R. 521. In the case, however, of *the King v. Watson*, 3 Price, 6, in the exchequer chamber, it must be conceded that the objection to the assignment which we are now considering, existed and was urged against its validity, and that the objection was overruled; there, however, as in the other cases, the principal

question was whether the assignment was not void under the bankrupt laws. The case, however, is a very bald one, and is entitled to very little weight as authority. The opinion is exceedingly brief, and refers to no cases.

This question has several times been under the consideration of the Supreme Court of Massachusetts; but it has generally, if not always, been so connected with other objections to the assignment that it is exceedingly difficult to say, upon a review of all those cases, what the judgment of that court would be upon the naked and insulated point which we are now considering. *Hatch v. Smith*, 5 Mass. 42; *Widgery v. Haskell*, 5 Mass. 144; *Ingraham v. Geyer*, 13 Mass. 146; *Hastings v. Baldwin*, 17 Mass. 552; *Harris v. Sumner*, 2 Pick. 129. Judge Story had occasion to consider these cases in *Halsey v. Whitney*, 4 Mason, 229, which was decided in October, 1826, and the conclusion which he deduced from them was, that this precise point was not directly decided in any of them. He observed that there were intimations in several of these cases which would justify a doubt whether the court were prepared to admit the validity of such a stipulation, while in others which contained a similar provision no objection was taken to it by the counsel who argued them, or by the court in their judgment. His conclusion on the whole was, that the point was not judicially settled in Massachusetts. In that opinion he is sustained by Chief Justice Parker, who, in *Borden v. Sumner*, 4 Pick. 265, which was decided in the same month with *Halsey v. Whitney*, obviously considered the question as still open, and declined expressing any definitive opinion upon the subject, as it was not necessary to the decision of the cause then under judgment. The subsequent cases of *Andrews v. Ludlow*, 5 Pick. 28, and *Lupton v. Cutter*, 8 Pick. 298, leave the question in Massachusetts still in the same state of uncertainty. The most that can be said is, that in several of the cases, although the assignment contained this provision, the objection was not taken either by the counsel or the court. Judge Ware, of the U. S. District Court for the State of Maine, in the case of *G. & I. Lord, libellants, v. The Brig Watchman*, reported in the 16th No. of the *Amer. Jurist*, 284, in a very elaborate and learned opinion, in which all the Massachusetts cases are referred to, also came to the conclusion that it was there still an open question.

In Pennsylvania, an assignment containing a stipulation for a release was sustained in *Lippincott v. Barker*, 2 Binney, 174. Judge Breckenridge, however, dissented, and Ch. J. Tilghman and Mr. Justice Yeates, whose opinions prevailed, took pains to put themselves upon the particular circumstances of the case. The Chief Justice observed, p. 182: "It being, however, to be distinctly understood that my opinion is confined to the circumstances of the present case; for there are many and strong objections to deeds of assignment made without the privity of creditors, and excluding all who do not execute releases." *Vide also* *Burd v. Smith*, 4 Dall. 76.

On the other hand, the Supreme Court of Errors of Connecticut, in *Ingraham v. Wheeler*, 6 Conn. 277, pronounced an assignment fraudulent and void solely on the ground that it confined the distribution of the property assigned to those creditors who should give the assignor a discharge. It was the decisive point in the case, and was fairly met and decided by the court.

The same principle was also decided in Ohio, in *Atkinson v. Jordan*, 5 Hammond Rep. 293.

In *Pierpoint v. Graham*, 4 Wash. C. C. Rep. 282, Judge Washington sustained an assignment containing this condition. In the district court in Maine, in the case already referred to, such a condition was held fraudulent. And Judge Story, in *Halsey v. Whitney*, 4 Mason, 230, although he came to the conclusion with obvious doubt and hesitation, that the weight of authority was in favor of the validity of an assignment with such a condition, did not hesitate to declare that if the question were entirely new and many estates had not passed upon the strength of such assignments, the strong inclination of his mind would be against their validity. It is very clear that Judge Story, in coming to the conclusion that the weight of authority lay upon that side of the question, inferred it, as Judge Ware has expressed it, not so much from the authoritative decisions of the court, as from the silent acquiescence of the public; not that it had been clearly settled, or distinctly recognized by the judicial tribunals, but that it had slowly ripened into a rule of the common law of Massachusetts by usage and custom.

There being, then, such a conflict among the authorities, and so much doubt on which side the preponderance lies, it seems to be not only proper but necessary to consider the question with reference to the general principles involved in it. Every conveyance of property to trustees is, to a certain extent, a hindering and delaying of creditors. It interrupts and presents obstacles to their legal remedies; and every such assignment is absolutely void, if it does not appoint and declare the uses for which the property is to be held and to which it is to be applied. A provision that the uses shall be subsequently declared by the assignor will not do; they must accompany the instrument and appear on its face, in order to rebut the conclusive presumption of a fraudulent intent, which would otherwise arise. But where the assignor parts with all control over the property, and devotes it absolutely to the benefit of his creditors, without any reservation or stipulations for his own advantage, the honesty of his intention is so apparent, and the advantage to the creditors so direct and decisive, that they cannot be said to be obstructed or delayed in their remedies. But where, instead of directly distributing his property among his creditors as far as it will go, he places it beyond their reach by an assignment, not merely for the purpose of saving it from one particular creditor, to be given to another, or to be equally divided among all, but for the purpose of enabling him to extort from some or all of them, an absolute discharge of their debts as the condition of receiving a partial payment,

he perverts the power to a purpose which it was never intended to cover, and which the principle on which the right to give preferences is founded, will not justify. Why should a debtor be permitted in this way to operate upon the fears of his creditors and coerce them into his own terms? It has sometimes been said, in answer to this view of the case, that there is nothing immoral or unjust in a debtor in embarrassed circumstances, and who is unable to pay all his debts, making the best arrangement in his power with his creditors, and giving the largest dividend or the whole, to those who will settle with him on the best terms; and if he can do this while he retains his property in his own hands, there is no reason, it is said, why he should not be permitted to do it under the cover of an assignment. Parties not under legal disabilities may make such contracts as they please; and if they are supported by a consideration, and there is no fraud in the case, they will not be disturbed. If a debtor, therefore, with his property in his own hands and open to the legal pursuit of his creditors, can satisfy them that it is for their interest or the interest of any of them to accept 2s. 6d. in the pound, and give him an absolute discharge, there is no legal objection to it; they treat upon equal terms; the ordinary legal remedies of the creditor are not obstructed. But the case is materially changed when the debtor first places his property beyond the reach of his creditors, and then proposes to them terms of accommodation. He obstructs their legal remedies, hinders and delays them in the prosecution of their suits, by putting his property into the hands of trustees, with the view of getting an absolute discharge from his debts, and exempting his future acquisitions from all liability. It has been decided in this court that the reservation of the least pecuniary provision for the assignor or his family renders an assignment of this description fraudulent and void. How much more valuable is a discharge from his debts or a portion of them to an insolvent debtor than a temporary pecuniary pittance. Judge Van Ness, in *Hyslop v. Clarke*, states what I consider to be the sound principle upon this subject. He says an insolvent debtor has no right to place his property in such a situation as to prevent his creditors from taking it, under the process of a court of law, and to drive them into a court of equity, where they must encounter expenses and delay, unless it be under very special circumstances and for the purpose of honestly giving a preference to some of his creditors, or to cause a just distribution of his estate to be made among them all. Judge Spencer, in *Austin v. Bell*, and Chancellor Kent, in *Seaving v. Brinckerhoff*, obviously concurred in the soundness of that position. Judge Story expressed his approbation of it in *Halsey v. Whitney*. The Supreme Court of Errors in Connecticut adopted it in *Ingraham v. Wheeler*, and it was most happily and impressively amplified and illustrated by the learned judge of the United States District Court for the State of Maine, in the case to which I have referred.

It is time that some plain, simple, but comprehensive principle

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 should be adopted and settled upon this subject. In the absence of a bankrupt law, the right of giving preferences must probably be sustained. Let the embarrassed debtor therefore assign his property for the benefit of whom he pleases; but let the assignment be absolute and unconditional; let it contain no reservations or conditions for the benefit of the assignor; let it not extort from the fears and apprehensions of the creditors, or any of them, an absolute discharge of their debts as the consideration for a partial dividend; let it not convert the debtor into a dispenser of alms to his own creditor; and above all, let it not put up his favor and bounty at auction under the cover of a trust to be bestowed upon the highest bidder. After the maturest reflection upon this subject, I have come to the conclusion that the interests, both of debtor and creditor, as well as the general purposes of justice, would be promoted, if the question is still an open one, by confining these assignments to the simple and direct appropriation of the property of the debtor to the payment of his debts. The remnants of many of these insolvent estates are now wasted in litigation growing out of the complex or suspicious character of the provisions of these assignments. One device after another to cover up the property for the benefit of the assignor, or to secure to him, either directly or indirectly, some unconscientious advantage, has from time to time been brought before our courts and received condemnation. But new shifts and devices are still resorted to, and will continue to be so, until some principle is adopted upon the subject, so plain and simple that honest debtors cannot mistake it, and fraudulent ones will be deterred from its violation by the certainty of detection and defeat. The principle to which I have adverted, it appears to me, if adopted, will, to a very considerable extent, accomplish that object.

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 But there is another provision in this assignment which, it appears to me, it is impossible to sustain. It is that which gives to the assignee full power and liberty to compound with all or any of the creditors in such manner and upon such terms as they shall deem proper, so, however, as not to interfere with or depart from the order of preference established in the assignment. The effect of this provision is, as is stated by the Chancellor, to perpetuate the right of giving preferences by vesting in the assignees an arbitrary power in relation to these several classes of creditors, and of compounding with any one upon such terms as they may think proper. I do not see how any other construction can be given to it; it has repeatedly been decided that an assignment which does not declare the uses, but reserves to the assignor the power of subsequently doing it, is fraudulent and void; and if the assignor cannot reserve the power of giving preference to himself, he certainly cannot legally confer it upon his assignee; the same objection in principle exists in both cases.

¹ Hudson v. Maze, 4 Ill. 578; State v. Benoist, 37 Mo. 500, 512; McConnell v. Sherwood, 84 N. Y. 522, acc. See also Smith v. Hurst, 10 Hare, 30; Gazzam v. Poyntz, 4 Ala. 374; Skeevil v. Donaldson, 20 Kan. 165; Mussey v. Noyes, 26 Vt. 462;

The next and only remaining objection to the assignment which I shall consider is, that it does not fix the time within which the assignees are to give notice to the creditors in class No. 2 to come in and execute the discharge and receive their dividend. After paying class No. 1, the assignees are to pay the surplus to such of the creditors in class No. 2 as shall, within three months from the time when thereunto in writing requested by them, agree to receive their dividend and execute a discharge. The Chancellor seems to suppose that the assignees, under this provision, may give notice to one of the creditors at one time, and to others at another time, and that each must come in within three months after receiving his notice. When the first comes in, he must execute a discharge, although there is no certainty whether the others will be called upon, or that they will have an opportunity of coming in within a reasonable time. I should incline to the opinion that it was the duty of the assignees to give notice to all the creditors at the same time. But still, the objection remains that that time is not fixed or limited by the assignment, but is left to their discretion; and that the creditors would have no remedy for an unreasonable delay on the part of the assignees, except by a resort to a court of equity. This objection does not strike me with as much force as it appears to have done the chancellor. Where there is nothing fraudulent or suspicious in the trust itself, and from the nature of the case, it is seen to be necessary that some latitude of discretion in relation to it should be given to the assignees, I am not prepared to say that the circumstance, that there is no remedy for an abuse of that discretion, except by a resort to a court of equity, is sufficient to avoid the trust. To a certain extent, that may have been the fact in the case. But where a matter, affecting the rights and interests of creditors, which might and ought to have been made definite and certain, is left to the discretion of assignees, different considerations arise; and I should incline to the opinion that it would be fraudulent. It is unnecessary, however, to dwell upon this point, as I hold the assignment fraudulent upon the other grounds which have been stated.

I also abstain from any discussion of the question, whether the debt of the Messrs. Beach, the creditors first named in class number one, was a debt due from the firm of Grover and Gunn, or was the individual debt of one of them; and admitting it to have been an individual debt, what influence it would have upon this assignment. It is an im-

White v. Monsarrat, 18 B. Mon. 809; Lininger v. Raymond, 9 Neb. 40; Watkins v. Wallace, 19 Mich. 57 (debts which assignee "may deem bad or doubtful."), *contra*.

In some States statutes have been passed giving an assignee power to compromise debts. See 23 Lawyers' Rep. Ann. 579, n.

A provision authorizing the assignee to compromise debts due the assignor is valid. White v. Monsarrat, 18 B. Mon. 809; Robins v. Embry, Sm. & Mar. 207; McConnell v. Sherwood, 84 N. Y. 522; Bagley v. Bowe, 105 N. Y. 171; Conkling v. Coonrod, 6 Ohio St. 611.

An assignment made with the design to force a compromise with a creditor, though good on its face, is fraudulent. Bennett v. Ellison, 23 Minn. 242.

portant question which, I agree with the Chancellor, ought to be settled in a case where there is no dispute about the facts.

I am for affirming the decree below.

After the several opinions delivered in the cause had been read,¹ Mr. Justice SUTHERLAND proposed the following resolution for adoption: "Resolved, that the assignment is void, because it makes the preference given to the creditors of the assignors, designated as class No. 2, to depend upon the condition that the preferred creditors shall give the assignors an absolute discharge of their debts;" and, on the question being put, "Shall this resolution be adopted?" the members of the court voted as follows:

In the affirmative. — The PRESIDENT, Chief Justice SAVAGE, Justices SUTHERLAND and NELSON, and Senators ARMSTRONG, BRADSRLEY, CONKLIN, CROPSEY, DEITZ, LYNDE, MACDONALD, SHERMAN, STOWER, TRACY, VAN SCHAICK — 15.

In the negative. — Senators EDMONDS, GANSEVOORT, GRIFFIN, SUDAM, WESTCOTT — 5.

And the court accordingly *affirmed* the decree of the chancellor, the final vote being the same as on the passage of the resolution.²

¹ The opinions of Senators EDMONDS and TRACY are omitted.

² *Perry Ins. Co. v. Foster*, 58 Ala. 502; *Danner v. Brewer*, 69 Ala. 191 (statutory); *Collier v. Davis*, 47 Ark. 397; *Duggan v. Bliss*, 4 Colo. 223; *Ingraham v. Wheeler*, 6 Conn. 277, 282; *Hayes v. Johnson*, 6 D. C. 174; *Howell v. Dixon*, 21 Fla. 413; *McBride v. Bohanan*, 50 Ga. 527; *Johnson v. Farnum*, 56 Ga. 144; *Conkling v. Carson*, 11 Ill. 503; *Townsend v. Cox*, 151 Ill. 62, 68; *Butler v. Jaffray*, 12 Ind. 504; *Franzen v. Hutchinson*, 94 Ia. 95; *Graves v. Roy*, 13 La. 454; *Hubbard v. McNaughton*, 43 Mich. 220; *May v. Walker*, 35 Minn. 194 (otherwise by statute see *Farwell v. Brooks*, 65 Minn. 184); *Robins v. Embry*, *Smedes & M.* 207 (see *Mayer v. Shields*, 59 Miss. 107); *Jeffries v. Blackmann*, 86 Mo. 350; *Moore v. Carr*, 65 Mo. App. 64; *First Nat. Bank v. Newman*, 62 N. H. 410; *Owen v. Arvis*, 2 Dutch. 22, 44 (see also *North Ward Nat. Bank v. Conklin*, 51 N. J. Eq. 7); *Goodrich v. Downs*, 6 Hill, 438, 439; *Haydock v. Coope*, 53 N. Y. 68, 73; *Palmer v. Giles*, 5 Jones, Eq. 75; *Repplier v. Orrich*, 7 Ohio, 246; *Miners' Nat. Bank Appeal*, 57 Pa. 193, 199 (statutory); *Wilde v. Rawlings*, 1 Head, 34; *Ware v. Wanless*, 2 Wyo. 144, acc.

King v. Watson, 3 Price Ex. 6 (see also *Janet v. Whitbread*, 11 C. B. 406); *Brashear v. West*, 7 Pet. 608; *Halsey v. Whitney*, 4 Mason, 206, 229; *Talley v. Curtain*, 54 Fed. Rep. 43, 50; *Rankin v. Lodor*, 21 Ala. 380; *Clayton v. Johnston*, 36 Ark. 406 (overruled); *Doe v. Scribner*, 41 Me. 277; *Coakley v. Weil*, 47 Md. 277; *Nostrand v. Atwood*, 19 Pick. 281; *Hewlett v. Cutler*, 137 Mass. 285; *Livingston v. Bell*, 3 Watts, 198; *Lea's Appeal*, 9 Pa. St. 504; *Smith v. Millett*, 11 R. I. 528; *Claffin v. Iseman*, 23 S. C. 416, 417; *Boyd v. Haynie*, 83 Tex. 7; *Kellog v. Cayce*, 84 Tex. 213 (statutory); *Hall v. Denison*, 17 Vt. 310; *Gordon v. Cannon*, 18 Gratt. 387; *Long v. Meriden Britannia Co.*, 94 Va. 594; *Clarke v. Figgins*, 27 W. Va. 663, contra.

SECTION I. (*continued*).

(d) STATUTES OF LIMITATIONS.

WEAVER v. HAVILAND.

NEW YORK COURT OF APPEALS, MAY 8-JUNE 5, 1894.

[Reported in 142 New York, 534.]

ANDREWS, Ch. J. This is a judgment creditor's action, and the only defence relied upon at the trial was the Statute of Limitations. The action was commenced February 13, 1892. It appears from the pleadings that Phebe Haviland, mother of the defendant, took under the will of her husband, who died September 17, 1878, the use of his real estate and the income of his personal property for life. His real estate consisted of a house and lot in Geneva, in this State, and he held a mortgage on lands in Michigan, executed by Henry S. Weaver and wife. On the 13th day of April, 1880, Phebe Haviland, as executor of her husband's will, she then being in the State of Michigan, sold, and assigned the mortgage to one Fish for the sum of \$2,600, falsely representing to Fish that that sum was due and unpaid thereon, whereas in fact there was due and unpaid only the sum of \$2,100. Fish, upon ascertaining the fact, commenced an action in the courts of Michigan against Phebe Haviland to recover back the sum paid in excess of the amount due on the mortgage, and on June 9, 1881, recovered a judgment against her in the action. An action on this judgment was subsequently brought in the Supreme Court of this State January 28, 1886, and judgment was recovered thereon against Phebe Haviland March 9, 1886, for \$667.47, and execution thereon was issued and returned unsatisfied. Phebe Haviland, at the time of the death of her husband and ever thereafter, was a resident of the State of New York. It is found that shortly before the recovery of the Michigan judgment, and on or about June 2, 1881, Phebe Haviland conveyed to the defendant William W. Haviland her life estate in the house and lot, and gave to him the moneys received by her from Fish on the transfer of the mortgage, without consideration, and for the purpose of placing her property out of her hands, so that the same could not be reached upon a judgment in the action. Phebe Haviland died intestate August 2, 1888. This action is brought to reach the interest of Phebe Haviland in the property so fraudulently transferred to the defendant. There is another fact disclosed by the evidence as to which there is no finding, but which is deemed important by the counsel for the defendant, viz., that the money paid on the mortgage by Fish was at the time received by the defendant, and was retained by him as his own, with the consent of Phebe Haviland. But if this finding had been made, the

evidence would have justified the further finding that the defendant assumed to act in the transaction as the agent of his mother, and that Fish supposed he was so acting, and had no information, until the examination of the defendant in supplementary proceedings shortly before the bringing of this action, that the money had been retained by him.

The limitation of time for bringing actions in the nature of a creditor's bill to set aside a conveyance or transfer made by the judgment debtor in fraud of creditors is prescribed by section 382 of the Code of Civil Procedure. By the fifth subdivision of that section a creditor's action must be commenced within six years "after the cause of action has accrued." Such an action is to procure a judgment "other than for a sum of money on the ground of fraud in a case which on the 31st day of December, 1846, was cognizable by the Court of Chancery." The words "other than for a sum of money" in subdivision 5 included those cases in which equitable relief is required, although as part of the ultimate relief a money judgment is also demanded. *Carr v. Thompson*, 87 N. Y. 169. Unless, therefore, the right of action to set aside the fraudulent transfer from Phebe Haviland to the defendant accrued to the plaintiff more than six years prior to February 13, 1892, the day of the commencement of the action, the action was not barred. The right of Fish to bring an action to set aside the transfer did not accrue until he had recovered a judgment in this State against Phebe Haviland and the return of an execution unsatisfied. Until his claim against Phebe Haviland had ripened into a judgment he stood as a general creditor merely, and was not in a situation to assail the transfer to the defendant. The authorities upon this point are numerous and decisive. *Reubens v. Joel*, 13 N. Y. 488; *Dunlevy v. Tallmadge*, 32 N. Y. 457; *Geery v. Geery*, 63 N. Y. 252; *Adsit v. Butler*, 87 N. Y. 585. The time when the fraud was committed is not the period from which the limitation is to be computed, but the time when the plaintiff had acquired a standing to assail it. The present action was commenced within six years after Fish had recovered his judgment here. The defendant, in the absence of fraud or collusion, cannot question the validity of the claim upon which it was rendered, and he acquired no immunity from pursuit because of the time which intervened between the fraudulent transaction and the rendition of the judgment. *Decker v. Decker*, 108 N. Y. 128. The clause in sub. 5, sec. 382, following the clause above quoted, "the cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff or the person under which he claims of the facts constituting the fraud," does not help the defendant. This clause was added to enlarge the time for bringing the action beyond the six years in the case specified. It was not intended to make the date of the discovery of the fraud the time of the accruing of the right of action in cases where the fraud was known, but the plaintiff had not established his claim by judgment. The clause was inserted to provide for a class of cases where the right of action was perfect, but the fraud had not been discovered until a subsequent period. *Gates v. Andrews*, 87 N. Y. 657.

It is, however, a sufficient answer to the claim based on this clause of sub. 5 that there is no evidence or finding that the plaintiff or his assignor, Fish, had any notice of the fraudulent transfer until shortly before the commencement of the action.

The further claim is made that a cause of action for money had and received could have been maintained by Fish against the defendant to recover the overpayment on the mortgage, immediately after the money came to his hands, he having received and retained it without consideration, and that this cause of action was barred by the lapse of six years and before this action was brought. The defendant may be right in his contention. Roberts v. Ely, 113 N. Y. 128. But assuming this to be true, the present action is not based on an original liability of the defendant arising from his connection with the sale of the mortgage. The plaintiff's assignor did not elect to proceed against the defendant upon this liability. He brought his action against Phebe Haviland, the principal in the transaction, and on recovering judgment against her, brought this action based upon that judgment, to charge the defendant on account of his fraudulent dealings with her to the prejudice of her creditors. The cause of action is entirely distinct from the cause of action against him for money had and received, and is in no way dependent upon his original relation to the transfer of the mortgage or the recovery had thereon. He is called upon to answer for the property of Phebe Haviland, received by him in fraud of her creditors. Whether he was connected with the original fraud in the sale of the mortgage is wholly immaterial in the present action, except as it may reflect upon his fraudulent intent in his subsequent dealings with Phebe Haviland.

We think the defence of the Statute of Limitations failed, and the judgment should, therefore, be affirmed, with costs.

All concur.

*Judgment affirmed.*¹

¹ There is great diversity of decision in regard to the Statute of Limitations as applied to fraudulent conveyances. Not only do the statutes themselves fix various terms, but in the same jurisdictions different rules are often applied in law and in equity, and different rules are applied where real estate is fraudulently conveyed, from those applied to transfers of personal property. Besides, no uniform rule can be stated as to the effect of fraudulent concealment of a cause of action, or as to the time when the plaintiff's cause of action is held to accrue.

The creditor's right is subject to least limitation in England. There, so long as the creditor's claim is itself not barred by the statute, his right to set aside a fraudulent conveyance, and to have equitable as well as legal relief for the purpose, is not barred, though the fraudulent conveyance may have been made many years before and the creditor may have had full knowledge of the facts. In re Maddever, 27 Ch. D. 523. In Michigan it has also been said that mere delay is not enough to debar a creditor, Corbitt v. Cutcheon, 79 Mich. 41. Conf. Cutcheon v. Buchanan, 88 Mich. 594; Cutcheon v. Corbitt, 99 Mich. 578. So in North Carolina, Pickett v. Pickett, 3 Dev. 6; Peterson v. Williamson, 2 Dev. 326; Dobson v. Erwin, 4 Dev. and B. 201. But see N. C. Code, § 155, sub-sec. 9, and Osborne v. Wilkes, 108 N. C. 651.

In this country it is generally held, however, that not only the creditor's claim, but his subsidiary right to attack the fraudulent conveyance, may be barred by lapse of time. In a few States possession by the fraudulent grantee of property conveyed — at least if it is real estate — bars recovery by the creditor without reference either to the

time when his right accrued or his knowledge of the fraud. *Snedicor v. Watkins*, 71 Ala. 48 (see also *Smith v. Hall*, 103 Ala. 235); *Robbins v. Sackett*, 23 Kan. 301; *Welcker v. Staples*, 88 Tenn. 49. See also *Bobb v. Woodward*, 50 Mo. 95; *Potter v. Adams*, 125 Mo. 118. In Indiana the rule is the same, unless there has been some trick to prevent inquiry or some act of positive concealment. *Law v. Smith*, 4 Ind. 56; *Musselman v. Kent*, 33 Ind. 452; *Lemster v. Warner*, 137 Ind. 79. See also *Sankey v. McElevay*, 104 Pa. 265; *Scranton, etc. Co. v. Lackawanna, etc. Co.* 107 Pa. 136.

But in most jurisdictions time does not run against the creditor until he has had notice of the fraud. This is so provided by statute in many States and is the prevailing rule in equity without the aid of a statute. An overruled decision by Lord Mansfield that fraud is a good replication to a plea of the Statute of Limitations in an action at law has also had some following in this country. See Wood on Limitations, §§ 274-276. A creditor who might by due diligence have discovered the facts has been held not within this protection. *Little v. Reynolds*, 101 Ga. 594; *Wright v. Davis*, 28 Neb. 479. But see *contra*, *Way v. Cutting*, 20 N. H. 187; *Preston v. Cutter*, 64 N. H. 461 (*conf.* *Hathaway v. Noble*, 55 N. H. 508). Likewise the recording of the deed alleged to be fraudulent has been held to affect creditors constructively with notice. *Shins v. Gray*, 93 Ia. 38; *Cockrell's Exec. v. Cockrell*, (Ky.) 15 S. W. Rep. 1119; *Rogers v. Brown*, 61 Mo. 187; *Hughes v. Littrell*, 75 Mo. 573; *Potter v. Adams*, 125 Mo. 118; *Gillespie v. Cooper*, 36 Neb. 775.

Furthermore, though the fraud be discovered, time does not begin to run unless the creditor has at that time a right to begin proceedings to avoid the transfer. A judgment against the debtor is a prerequisite to such proceedings at common law. 14 Am. and Eng. Encyc. of Law (2d ed.), 315. There is, therefore, no right until the judgment is obtained. Accordingly, as held in the principal case, time does not begin to run until that moment. *Brown v. Campbell*, 100 Cal. 635; *Jones v. Reed*, 1 Humph. 335 (changed by statute, *Ramsey v. Quillen*, 5 Lea, 184); *Compton v. Perry*, 23 Tex. 414; *Martel v. Somers*, 26 Tex. 551. In Alabama, Arkansas, Indiana, Maryland, Massachusetts, Mississippi, North Carolina, Ohio, South Carolina, Tennessee, Virginia, West Virginia, at least, by statute, a creditor may set aside a fraudulent conveyance without first getting judgment. See 14 Am. and Eng. Encyc. of Law (2d ed.), 319. In such States the statute begins to run immediately from the time of the discovery of the fraud. *Combs v. Watson*, 32 Ohio St. 228; *Ramsey v. Quillen*, 5 Lea, 184; *McBee v. Burden*, 7 Lea, 731; *Welcker v. Staples*, 88 Tenn. 49.

In some cases relief has been denied by courts of equity because of laches, though no Statute of Limitations had run. *Frenche v. Kitchen*, 53 N. J. Eq. 37; *Hathaway v. Noble*, 55 N. H. 508; *Elgelberger v. Kibler*, 1 Hill Ch. 113. See also *Bank of Charleston v. Dowling*, 52 S. C. 345.

SECTION II.

PREFERENCES.¹

INTRODUCTORY NOTE.

THE English law in regard to preferences affords little assistance in the consideration of the American law. The early bankruptcy statutes did not forbid preferences, and they were first declared invalid on the ground that they were fraudulent. Lord Mansfield is regarded as the originator of this doctrine. See *Worsley v. De Mattos*, 1 Burr. 467; *Alderson v. Temple*, 4 Burr. 2285; *Martin v. Pewtress*, 4 Burr. 2477; *Harman v. Fishar*, Cowp. 117; *Rush v. Cooper*, Cowp. 629. As the doctrine was of judicial creation, and as the basis of it was that the debtor was committing a fraud, it was natural that somewhat narrow limits should be set. Especially it seemed that if the debtor did not wish to give a creditor an unfair advantage, there could be no fraud on his part and hence no fraudulent preference. It was necessary, therefore, that the preferential payment or transfer should be (1) made in contemplation of bankruptcy and (2) made voluntarily.

As to the first requisite, in several cases it was held necessary that the debtor should in fact intend to become a bankrupt. *Morgan v. Brundrett*, 5 B. & Ad. 289; *Atkinson v. Brindall*, 2 Bing. N. C. 225; *Abbott v. Burbage*, 2 Scott, 656; *Strachan v. Barton*, 11 Ex. 647. Other cases held it sufficient if the debtor was in such a condition of utter insolvency that no reasonable man could fail to anticipate bankruptcy. *Gibson v. Muskett*, 4 M. & G. 160; *Gibson v. Boutts*, *id.* 169; *Ex parte Simpson*, De G. 9; *Aldred v. Constable*, 4 Q. B. 674. But mere insolvency certainly was always insufficient.

The second requisite has given rise to a great number of decisions involving somewhat artificial distinctions. If the payment was made because of pressure on the part of the creditor the transaction cannot be avoided. *Van Casteel v. Booker*, 2 Ex. 691. If the debtor was induced by several considerations, among others a desire to prefer, the question is whether that was the dominant motive. *Ex parte Griffith*, 23 Ch. D. 69; *Re Eaton*, [1897] 2 Q. B. 16. If, however, the object of the debtor was to escape a criminal prosecution (*Ex parte Taylor*, 18 Q. B. D. 295; *Sharp v. Jackson*, [1899] A. C. 419), or to protect a surety from liability (*Re Mills*, 58 L. T. n. s. 871), or to avoid the bar of the Statute of Limitations (*Re Lane*, 23 Q. B. D. 74), or to fulfil a supposed legal duty (*Re Fletcher*, 9 Mor. 8; *Re Vingoe*, 1 Man. 416), there is no preference. A valid bill of sale given to correct a mistake invalidating a former one is not a preference. *Re Tweedale*,

¹ For convenience of treatment this section covers the subject of preferences regarded not only as acts of bankruptcy, but from other points of view.

[1892] 2 Q. B. 216. Nor does payment by a trader of bills of exchange in due course raise any inference of an intention or view to prefer "because in the ordinary course of business a man must either meet his bills or put up his shutters." *Re Clay*, 3 Mans. 31. But if the payment of a bill is out of the usual course of business it is otherwise. *Re Eaton*, [1897] 2 Q. B. 16.

There was no statutory provision in the English bankruptcy acts in regard to preferences until the act of 1869 was passed. Section 92 of that act, which is substantially reproduced, except in one particular, in section 48 of the present act, passed in 1883, provides for the avoidance of preferences. The latter section reads as follows:—

"(1) Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall, if the person making, taking, paying, or suffering the same, is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in bankruptcy. (2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt."

In section 92 of the act of 1869 the proviso at the end of the section was that the section should "not affect the rights of any purchaser, payee, or incumbrancer in good faith for valuable consideration." These words were held to include and protect a creditor who had received payment in ignorance that his debtor was insolvent or intended to prefer him. *Butcher v. Stead*, L. R. 7 H. L. 839. Under the present act such a construction seems impossible.

The provisions of section 92 of the act of 1869 and section 48 of the act of 1883, abrogated the necessity for a payment to be made in contemplation of bankruptcy in order to be a fraudulent preference, substituting as requirements that the payment must be made when the debtor is unable to pay his debts when they become due and actually becomes bankrupt within three months. But the requirement of voluntary action on the part of the debtor is still in full force. "With a view of giving such creditor a preference" has been held to mean "with the dominant motive of giving such a preference." See cases above cited. Almost these identical words in the American statutes have received a very different construction, as the cases printed below indicate.

What has been said hitherto relates to the right on the part of a trustee in bankruptcy to avoid and recover a preferential payment or transfer. But preferences are, since the act of 1883, also important as acts of bankruptcy. Although the framer of the act of 1869 believed that that act not only invalidated preferences, but also made them acts of bankruptcy, *Eden on Bankruptcy*, 25, the court held otherwise.

Ex parte Hodgkin, L. R. 20 Eq. 746; *Ex parte* Stubbins, 17 Ch. D. 58. The act of 1883 in section 4, however, expressly names preferences as acts of bankruptcy.

Doubtless a chief reason for the simpler and more satisfactory law of preference in this country is that the question was dealt with fully by statute before it had been partially treated by the courts. Section 2 of the act of 1841 defined and forbade preferences, and the act of 1867, copying the insolvent law of Massachusetts and adopting a construction of the meaning of the words copied similar to that laid down by the Massachusetts courts, fixed the American law in the shape which in most respects it now has under the law of 1898.

SECTION II. (*continued*).

(a) INSOLVENCY.

CHICAGO TITLE & TRUST CO. v. JOHN A. ROEBLING'S SONS CO.

DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS,
FEBRUARY 8, 1901.

[*Reported in 107 Federal Reporter, 71.*]

KOHLSAAT, District Judge. The questions of fact herein, as found by the master, will be taken as the ultimate facts in the case, no good grounds to the contrary being shown. Upon these facts there is but one proposition of law to be passed upon by the court, which will be stated in general terms as follows: Where the property of the bankrupt before insolvency consists chiefly of a manufacturing plant and raw materials for use in said plant, the fair valuation of which depends in large part upon the fact that said plant is a going concern, and such fair valuation as a going concern brings the entire fair value of the assets of said bankrupt to a total in excess of the bankrupt's liabilities, would the fact that a judgment creditor caused a levy under his judgment to be made upon such plant, and its sale under such levy, thus destroying the value of said plant as a going concern, and bringing the total value of the assets of said bankrupt, including the sum realized from the sale of the plant under said levy, to a figure below the bankrupt's liabilities, create a preference in favor of said judgment creditor, which could be recovered by the bankrupt's trustee, when such judgment creditor has reasonable cause to believe that such levy and sale would cause the insolvency of the bankrupt as aforesaid? While I regret to be forced to the conclusion, yet I am of the opinion that, under the wording of the present bankruptcy act, and especially the proper interpretation of the words "being insolvent," such action on

the part of a judgment creditor would not create a preference recoverable by the trustee under the terms of the act. The exceptions to the master's report will therefore be overruled, the report confirmed, and the petition of the trustee be dismissed for want of equity.¹

SECTION II. (*continued*).

(b) INTENT TO PREFER.

MUNDO v. SHEPARD.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, DECEMBER 10, 1895—
JUNE 10, 1896.

[*Reported in 166 Massachusetts, 323.*]

BILL in equity, filed July 2, 1894, by the assignee in insolvency of Adelaide C. Clark, to set aside an assignment of certain accounts made by the insolvent as security for a debt due to the defendants.

The case was heard in the Superior Court, before DEWEY, J., who dismissed the bill, and, at the request of the plaintiff, reported the case for the determination of this court, in substance as follows:—

The insolvent, Adelaide C. Clark, was, in 1893, a dressmaker and milliner doing business in Boston, and being at that time indebted for goods sold to her by the defendants, Shepard, Norwell, and Company, in the sum of about \$1,700, she, on May 6, 1893, assigned to them as security for her indebtedness certain accounts due and owing to her, amounting in all to about \$2,100, it being understood that the surplus of such accounts when collected was to be returned to Mrs. Clark if additional credit to that amount had not been furnished to her. Thereafter, on October 12, 1893, Mrs. Clark filed a voluntary petition in insolvency, and the plaintiff was appointed assignee.

Mrs. Clark testified that she carried on a large business as dressmaker and milliner in Boston; that at the time of the assignment to the defendants her assets were from \$9,000 to \$11,000, and her liabilities were about \$16,500; that of the latter amount \$6,500 were debts due mostly for merchandise; that her creditors included many of the large dry goods houses in Boston; that she kept no regular books of account, and she estimated her assets and liabilities from investigations made at the time of the hearing; that most of these liabilities were

¹ See *Duncan v. Landis*, 106 Fed. Rep. 839, 858 (C. C. A.).

Under the English acts, the United States act of 1867, and the Massachusetts Insolvent Law, it was uniformly held that insolvency, on the part of a trader at least, meant an inability to pay his debts as they matured, irrespective of the value of the debtor's property. The cases are collected in *Lowell, Bankruptcy*, § 41.

overdue, and she was unable to pay them; that for several years prior to her assignment she had had an open account with the defendants, which, until the winter of 1893, had not exceeded \$500, but at that time, her business increasing, she increased her account to such an extent that the defendants notified her that unless it was reduced they should refuse her further credit; that prior to said assignment one Collirton, representing the defendants, called frequently at her store to sell goods and collect money, and she told him that she could not make any large payment upon her account; that she did not have the money to pay it in full because collections were slow, but she occasionally made small payments; that one Webster, who had charge of the credits and financial matters of the defendants' business, told her that her account must be reduced or further credit would be refused, and inquired as to the prospects of her making collections, to which she replied that the bills were all good, and she expected to collect them, when she would apply them on her account, but that she did not wish her credit stopped as her business was good; that thereupon Webster suggested, as a condition for the continuation of her credit, the assignment of certain accounts which were good; and that after the assignment credit was from time to time given her, but was finally refused, and at the time of filing the petition in insolvency her indebtedness to the defendants had increased. Mrs. Clark further testified that she did not know whether or not she told Webster or Collirton that she had other creditors besides the defendants, or that other creditors were pushing her, though in fact one creditor had brought suit against her; that she did not inform them of a mortgage upon her stock in trade; that she did not at the time of the assignment to the defendants intend or expect to go into insolvency; that her business was good; that she did not wish the defendants to refuse her credit, as she hoped that with it she could go on; that she did not believe herself to be insolvent or fully realize her condition; and that she did not figure her liabilities closely, but had a general idea of what she owed, and that she should be able to pay all her creditors in full.

On cross-examination, in answer to the question whether she meant to prefer the defendants, she testified that she did not look at it in that way, but was anxious to get more credit, and that she had never previously assigned her accounts.

There was evidence for the defendants that in 1891 Mrs. Clark's credit was good, but in the spring of 1893 she became slow in her payments, and in conversations with the defendants or their representatives both she and her husband said that she was doing a good business, had some of the best trade in the city, and was amply able to pay all her bills, but that collections were slow, and she did not have much ready money; and that accounts due her were good, and that it would be all right. They did not tell the defendants that Mrs. Clark had other accounts, or mention the mortgage on her stock in trade. The defendants at one time refused her further credit, and subsequently

ordered it to be continued, and sales were from time to time made to her until her insolvency. This was all the material evidence.

The judge found that Mrs. Clark made the assignment within six months prior to filing her petition in insolvency; that at the time of the assignment to the defendants she was not able to pay her debts as they accrued in the ordinary course of business, and was insolvent, and that her total liabilities greatly exceeded her total assets; that the defendants had reasonable cause to believe Mrs. Clark to be insolvent only in the sense of not being able to pay her debts as they accrued in the ordinary course of business; that the assignment was not made in the usual and ordinary course of business, but that Mrs. Clark did not then contemplate going into insolvency, but thought that she would be able to keep on in business and pay all her debts; that the assignment was not made by her in fraud of the laws relating to insolvency, or with a view to prevent the property from coming to her assignee in insolvency, or to prevent the same from being distributed under the laws relating to insolvency, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation or effect of, or to evade any of the provisions of the insolvency law; and that the defendants, when the assignment was made, did not have reasonable cause to believe Mrs. Clark was insolvent in the sense of not having sufficient property and assets to pay her debts, or that she was in contemplation of insolvency, and that the assignment was made in fraud of the laws relating to insolvency, or with a view to prevent the property from coming to her assignee in insolvency, or to prevent the same from being distributed under the laws relating to insolvency, or to defeat the object of, or in any way impair, hinder, impede, or delay the operation or effect of the provisions of the insolvency law.

The case was argued at the bar in December, 1895, and afterwards was submitted on the briefs to all the judges.

C. R. Darling, for the plaintiff.

J. J. Higgins, for the defendants.

HOLMES, J. This is a bill in equity, brought by the assignee in insolvency of Mrs. Clark to set aside an assignment of certain credits made by the insolvent as security for a debt due to the defendants, and in order to obtain further credit from them. The case comes here on report. In form, the only question reserved is the correctness of a ruling that the bill cannot be maintained on the facts found by the judge who tried the case. But as one of the findings is that the assignment was not made in fraud of the insolvent laws, and as the evidence is reported, we assume with some hesitation, as the counsel have assumed in their arguments, that it was intended to open the correctness of this finding, as matter of law, in view of the facts subject to which it was made.

It is found that Mrs. Clark was insolvent at the time of the assignment, and that the assignment was not made in the ordinary course of business of Mrs. Clark. There was evidence tending to show that

Mrs. Clark had reasonable cause to believe that she was insolvent, and there is no question that the evidence warranted a finding for the plaintiff. On the other hand, it is not found that Mrs. Clark knew or had reasonable cause to believe that she was insolvent, and in view of the general finding under discussion, we can assume no more than the facts found or admitted require. It is found that she was not able to pay her debts as they fell due in the ordinary course of business, and this almost necessitates the assumption that she knew that she could not, and therefore knew that technically she was insolvent. But Mrs. Clark was a fashionable milliner, and there was evidence that at the time she believed, and the defendants believed, that her assets were more than sufficient to pay her debts, and that the want of ready money arose solely from the unwillingness to imperil her custom by pressing for prompt payment of her bills.

We suppose that it is with reference to such a case as that that all the later decisions have emphasized the necessity of finding an intent to create a preference, or to effect some other fraud on the insolvent law as a fact, before a conveyance can be set aside. *Bridges v. Miles*, 152 Mass. 249; *Sartwell v. North*, 144 Mass. 188, 192; *Rice v. Grafton Mills*, 117 Mass. 228, 232. It would be very hard to declare a conveyance void if at the time the grantor had property unquestionably sufficient to pay his debts, but owing to a cause like that mentioned, or to its being invested in land, he had not ready money enough to pay on demand, and therefore appropriated assets to pay or to secure one which was pressing, knowing that thereby the continuance of his business would be facilitated, and not doubting that his course was at least harmless to his other creditors. The evidence warranted a finding that Mrs. Clark supposed that to be her situation, and that her only motive was to get more credit. If she did suppose so, and in fact had no other motive, the tendency of her conduct to create a preference was not manifest to her because the tendency would not have existed if the facts believed by her were true, and therefore it would be a mere fiction to say that she acted "with a view to give a preference." It cannot be said that, as matter of law, every conveyance to secure a past debt is voidable when the grantor is insolvent and knows that he cannot pay his debts in the regular course of business as they fall due, even if his creditor has reason to believe that a fraud on the insolvent law is intended, and therefore it cannot be said, as matter of law, that the decree was wrong. *Decree affirmed.*¹

KNOWLTON, J. It seems to me so manifest that the decision of the judge of the Superior Court was founded on an error of law, that, notwithstanding a doubt in regard to the meaning of the reservation, I think that the decree should be set aside and the law applicable to cases of this kind more fully stated.

¹ *Quinebaug Bank v. Brewster*, 30 Conn. 589; *Bloodgood v. Beecher*, 35 Conn. 469, *acc.*

To avoid a conveyance under Pub. Sts. c. 157, § 96, it must be proved that at the time of making it the debtor was insolvent, or in contemplation of insolvency, that it was made within six months before the filing of the petition by or against him, that it was made with a view to give a preference, that the person receiving it had reasonable cause to believe that the debtor was insolvent or in contemplation of insolvency, and that the conveyance was made in fraud of the laws relating to insolvency. If the transaction was not in the usual and ordinary course of business of the debtor, a *prima facie* case of reasonable cause to believe on the part of the person receiving the conveyance is made out. Pub. Sts. c. 157, § 98; *Stevens v. Pierce*, 147 Mass. 510.

The judge found that the debtor was insolvent at the time of making the conveyance in question, that the conveyance was made within six months prior to the commencement of the proceedings in insolvency, that it was not made in the usual and ordinary course of business of the debtor, that the defendants then had reasonable cause to believe that she was insolvent, but only in the sense of not being able to pay her debts as they accrued in the ordinary course of business, that she did not then contemplate going into insolvency, and that the defendants did not have reasonable cause to believe that the conveyance was made in fraud of the laws relating to insolvency. The defendants were creditors, and the case is governed by the provisions of section 96 above referred to. If the debtor was insolvent, it is not necessary to show that she was in contemplation of insolvency, and no fraud need be proved other than making a conveyance when insolvent with a view to give a preference to a creditor. The judge in his findings seems to make a distinction in legal effect between insolvency in the sense of not being able to pay one's debts as they fall due in the ordinary course of business, and insolvency in the sense of not having sufficient property ultimately to pay one's debts if they are not enforced at maturity, and if time is given to enable the owner to dispose of the property advantageously. I know of no distinction recognized by our laws between the insolvency of a trader by reason of his being unable to pay his debts in the ordinary course of business as they mature and his inability ultimately to pay them. If a trader is in the condition of not being able to pay his debts in the ordinary course as they mature, he is insolvent, and is subject to all the consequences which the statute attaches to insolvency. The law deals with present conditions in reference to existing debts, and does not attempt the impossibility of correctly foretelling the future beyond the events immediately practicable in the ordinary course of business. The law intends that a trader in that condition shall do nothing to interfere with a *pro rata* distribution of his property among his creditors, if insolvency proceedings ensue within a stated time. Until the amendment by St. 1886, c. 322, if one in that condition, and having reasonable cause to believe himself so, paid or secured any debt in whole or in part within one year next be-

fore the filing of the petition by or against him, it was, by the express terms of Pub. Sts. c. 157, § 93, a fraud upon the law which prevented his obtaining a discharge. See *Cozzens v. Holt*, 136 Mass. 287. It did not take the case out of this provision of the statute if the debtor at the time believed his property exceeded in value the amount of his debts, and expected ultimately to pay all his creditors without proceedings in insolvency. If he made such a payment, he did it at the risk of its defeating his application for a discharge if insolvency proceedings were commenced within a year. So in regard to the right to recover back property conveyed, which has not been affected by this amendment, if insolvency proceedings ensue within six months the rights of the general creditors are preserved if the debtor was, at the time of the conveyance, insolvent, and if he acted with a view to give a preference to one who had reasonable cause to believe him to be insolvent and to intend a preference. If these conditions existed at the time of the conveyance it is immaterial that neither party contemplated insolvency proceedings, and that each hoped and expected that the debtor would get an extension and finally pay in full. These strict provisions are deemed necessary for the protection of creditors when one is unable to pay in the ordinary course of business.

In *Forbes v. Howe*, 102 Mass. 427, 435, is this language: "The case of *Jones v. Howland*, 8 Met. 377, relied on by the defendants, turned upon the question whether the sales which it was sought to avoid were made 'in contemplation of bankruptcy,' in the sense of the United States bankrupt act of 1841. The terms of that statute were held to require that the intent which would make void a sale must be an intent to give a preference in contemplation of bankruptcy. But the present bankrupt act avoids a sale made with a view to give a preference, if the debtor at the time be in fact insolvent, although he may not contemplate bankruptcy. Under this statute, we think the phrase 'with a view to give a preference' must be construed somewhat less strictly, so as to include an intent to give one creditor any advantage over others in respect of payment or security of his debt." This language is equally applicable to our statute, whose words in this part are the same as those of the United States bankruptcy act of 1867. U. S. St. March 2, 1867, § 35. In *In re George*, 1 Low. 409, 411, Lowell, J., says: "A debtor gives a preference when, knowing, believing, or suspecting that he cannot pay all his creditors in full, he chooses to pay or secure one, and thus give him an intended advantage over the rest. . . . If you find the knowledge of insolvency, and an expectation or fear of stopping payment, you must infer the intent, because every sane person is presumed to intend the well-known consequences of his acts." See also *Toof v. Martin*, 13 Wall. 40; *Wager v. Hull*, 16 Wall. 584. In *Fernald v. Gay*, 12 Cush. 596, 597, Chief Justice Shaw uses these words: "The plain object and policy of the insolvent law is, to require a debtor, as soon as he has reason to believe himself insolvent, and before he has frittered away his property,

by schemes which appear plausible, to put himself and his assets at once into the hands of the law, with a view to two objects: one is to make an equal distribution amongst all his creditors; the other, to pay every creditor as large a part of his whole debt as the means of the debtor will allow," etc. In *Holbrook v. Jackson*, 7 Cush. 136, 150, the same judge says: "We think the position insisted on by the plaintiff, that although actually insolvent, and although they had no reasonable ground to believe themselves solvent, against the fact, yet a sincere belief that they could go on, however groundless, and an intention to do so, would save the conveyance from being held invalid, cannot be maintained as law, under the existing statute." In this particular there has been no change in the law of this Commonwealth since these decisions were made. See also *Denny v. Dana*, 2 Cush. 160, 171; *Barnard v. Crosby*, 6 Allen, 327, 332; *Abbott v. Shepard*, 142 Mass. 17; *Whipple v. Bond*, 164 Mass. 182, the latest case in which the subject of fraudulent preferences has been considered by this court, reaffirms the doctrines laid down by Chief Justice Shaw.

A trader unable to pay his debts in the ordinary course of business may speculate upon the chances of being able to induce his creditors to wait, and of finally getting the means to pay them all in full; but in my opinion he and any creditor dealing with him with knowledge of his condition speculates at the risk of having a payment or conveyance set aside, and an equal distribution made if insolvency proceedings are commenced within six months. It seems to me that the enforcement of this rule is the only practicable way of securing justice to creditors who are outstripped in the race for payment or security. When a trader is unable to pay his debts in the ordinary course of business, there is risk, not only that creditors will not receive the money due them when they are entitled to have it, but that they will finally lose some part of it. To pay or secure a creditor under such circumstances is to give him a preference over others who have no security. In my opinion, all the preference that a trader, knowing himself to be insolvent, need intend in order to bring the case within the statute is security against the risk of delay and loss which necessarily results from his condition, and it is none the less a preference if, when such security is given, the debtor hopes and expects that the other creditors will ultimately be paid in full. It is not necessarily security against an expected loss, but against the risk of loss when the debtor is in fact insolvent, that constitutes the preference.

In the present case, the judge finds that the debtor, who bought and sold goods in the prosecution of her business as a dressmaker, was insolvent at the time of making the assignment. He finds that the defendants had reasonable cause to believe that she was insolvent. He finds facts which, under the statute, make a *prima facie* case against the defendants in support of the proposition that they had reasonable cause to believe that the conveyance was fraudulent. It seems to me that there is no evidence to overcome this *prima facie* case, and that

the finding that they had no reasonable cause to believe the conveyance to be fraudulent is erroneous in law. I think the evidence shows overwhelmingly that the debtor knew that she could not pay her debts in the ordinary course of business, and that one of her purposes in making the conveyance was to secure the defendants against the risk of loss growing out of her condition. I can see no evidence which tends to show the contrary. If these facts are conceded, I think the right of the other creditors to have this property distributed is not affected by any possible answer to the question whether she hoped or expected to be able to go on with her business and finally to pay her creditors. *Bridges v. Miles*, 152 Mass. 249, and other similar cases, merely hold that whether there was an intent to prefer is a question of fact. Treating this as a question of fact, I think the findings and the undisputed evidence in the present case are inconsistent in law with the decision of the judge of the Superior Court.

I am authorized to say that the Chief Justice and Mr. Justice LATHROP concur in this opinion.

TOOF v. MARTIN.

SUPREME COURT OF THE UNITED STATES, DECEMBER TERM, 1871.

[Reported in 13 Wallace, 40.]

ERROR to the Circuit Court for the District of Arkansas, the case being thus:—

The 35th section of the bankrupt act of 1867 thus enacts:—

“That if any person, being insolvent, or in contemplation of insolvency, with a view to give a preference to any creditor or person having a claim against him . . . makes any assignment, transfer, or conveyance of any part of his property . . . (the person receiving such assignment, transfer, or conveyance, having reasonable cause to believe such person is insolvent, and that such assignment or conveyance is made in fraud of the provisions of this act), the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it or so to be benefited.”

With this enactment in force, Martin, assignee in bankruptcy of Haines and Chetlain, filed a bill in the District Court for the Eastern District of Arkansas, against J. S. Toof, C. J. Phillips, and F. M. Mahan, trading as Toof, Phillips & Co. (Haines and Chetlain being also made parties), to set aside and cancel certain conveyances alleged to have been made by these last in fraud of the above-quoted act.

Haines and Chetlain were, in February, 1868, and had been for some years before, merchants, doing business under the firm name of W. P. Haines & Co., at Augusta, Arkansas. On the 29th of that

month they filed a petition for the benefit of the bankrupt act, and on the 28th of May following were adjudged bankrupts, and the complainant was appointed assignee of their estates. On the 18th of the previous January, which was about six weeks before the filing of their petition, they conveyed an undivided half-interest in certain parcels of land owned by them at Augusta, to Toof, Phillips & Co., who were doing business at Memphis, in Tennessee, for the consideration of \$1,876, which sum was to be credited on a debt due from them to that firm. At the same time they assigned to one Mahan, a member of that firm, a title-bond which they held for certain other real property in Augusta, upon which they had made valuable improvements. The consideration of this assignment was two drafts of Mahan on Toof, Phillips & Co., each for \$3,034, one drawn to the order of Haines, and the other to the order of Chetlain. The amount of both drafts was credited on the debt of Haines & Co. to Toof, Phillips & Co., pursuant to an understanding to that effect made at the time. There was then due of the purchase-money of the property, for which the title-bond was given, about \$700. This sum Mahan paid, and took a conveyance to himself from the obligor who held the fee.

The bill charged specifically that at the time these conveyances were made the bankrupts were insolvent or in contemplation of insolvency; that the conveyances were made with a view to give a preference to Toof, Phillips & Co.; who were the creditors of the bankrupts; that Toof, Phillips & Co. knew, or had reasonable cause to believe, that the bankrupts were then insolvent, and that the conveyances were made in fraud of the provisions of the bankrupt act.

It also charged that the assignment of the title-bond to Mahan was in fact for the use and benefit of Toof, Phillips & Co., for the purpose of securing the property or its value to them in fraud of the rights of the creditors, and that this purpose was known and participated in by Mahan.

The answer, admitting a large amount of debts at the time of the conveyances in question, denied that the bankrupts were then "insolvent," asserting, on the contrary, "that at the time aforesaid Haines & Co. had available assets in excess of their indebtedness to the extent of \$16,000." It also denied that there was a purpose to give a preference; asserting that the conveyances of the land were made because Haines & Co., not having cash to pay the debt due Toof, Phillips & Co., were willing to settle in property; and it denied that the title-bond was assigned to Mahan for the benefit of Toof, Phillips & Co., or that they paid for the same; but on the contrary averred that Mahan bought the property and paid for it himself, and for his own use and benefit out of his own funds.

Appended to the bill were several interrogatories, the first of which inquired whether at the time of making the transfers to Toof, Phillips & Co. the indebtedness of W. P. Haines & Co. was not known to be greater than their immediate ability to pay; and to this Toof, Phillips

& Co. answered that at the time of making these transfers they did not believe Haines & Co. were able to pay their debts in money, but that they were able to do so on a fair market valuation of the property they owned, and of their assets generally.

Chetlain, one of the bankrupts, testified that on the 18th of January, 1868, Haines & Co. could not pay their notes as they came due; that previous to this time they had contemplated bankruptcy, and that he had had several conversations with Mr. F. M. Mahan, relative to their finances, and had told him the amount, or near the amount, of their debts. His advice was to get extensions, and he would help them get through; that after his promises to advance them more goods, they concluded not to go into bankruptcy, but to go on in business; that he told Mahan that Haines & Co. could not pay out; and in a conversation with him previous to the transfer of the real estate, he, Chetlain, told Mahan that such was the state of the finances of Haines & Co. that if he would assume their liabilities, and give them a receipt, Haines & Co. would turn over all their assets to him. He did not accept.

He also testified that about the 1st of January, 1868, the sheriff levied on the goods belonging to Haines & Co., in their storehouse in Augusta, on an execution in favor of one Weghe, which caused them to suspend business for a few days, until the levy was dissolved by order of the sheriff, at or about the 15th day of January, 1868. Mahan was in Augusta at the time of this levy, and Haines & Co. had an interview with him in regard to it.

During the entire autumn and winter preceding these transfers, Haines & Co. did not pay, except to Toof, Phillips & Co., more than \$500 on all their debts; and in the latter part of December, 1867, and the first part of January, 1868, some of the creditors sent agents to collect money from them, but got none, because Haines & Co. had no funds to pay them.

A witness, Frisbee, testified that he had assisted Mr. Haines in making up his balance-sheet "about the 1st of January, 1868, and that the result was that their available assets were not sufficient to pay their debts."

Another witness, an agent for an express company, testified that he received, about the last of December, 1867, or January, 1868, notes from Toof, Phillips & Co. and another firm against Haines & Co. for collection; that he presented them for payment to Haines & Co., and that they said they could not pay them at that time. They did not pay them to him. He knew something of the financial condition of Haines & Co., and of their debt to Toof, Phillips & Co., and of complaints of other parties, and something of their business through the country, and from all these facts he thought it doubtful about their being able to pay their debts. This was during the months of December, 1867, and January, 1868; and he wrote to Toof, Phillips & Co. that he thought they had better look to their interests, as his conviction

was that it was doubtful about their being able to collect their debt from Haines & Co. Shortly after writing this letter Mahan came round to look after the matter.

The property described in the title-bond assigned to Mahan, which he stated that he purchased as an investment on private account for \$7,000, was shown by the testimony of Chetlain to have been worth only \$4,000, and by the testimony of a witness, Hamblet, to have been worth only \$3,500, and it was valued by the bankrupts in their schedules at \$4,000. Both of the bankrupts testified that it was understood at the time the title-bond was assigned to Mahan, that the amount of the two drafts given by him on Toof, Phillips & Co. for it, should be credited to Haines & Co. on their indebtedness to that firm.

The schedules of the bankrupts annexed to their petition showed that their debts at the time of their transfers to Toof, Phillips & Co. exceeded \$59,000, while their assets were less than \$32,000.

On the other hand there was some testimony to show that some persons thought that they could get through, &c., &c.

The District Court decreed the conveyances void, and that the title of the property be vested in the assignee, the latter to refund the amount of the purchase-money advanced by Mahan to obtain the deed of the land described in the title bond, less any rents and profits received by him or Toof, Phillips & Co. from the property. This decree the Circuit Court affirmed.

In commenting upon the answer of Toof, Phillips & Co., already mentioned, which, in reply to the interrogatory, "whether at the time of the transfer to them the indebtedness of Haines & Co. was not greater than their ability," admitted that they did not believe Haines & Co. "able to pay their debts *in money*," the Circuit Court said:—

"Here is a direct confession of a fact that in law constitutes insolvency, and it is idle for the defendants to profess ignorance of the insolvency of the bankrupts in face of such a confession. If the bankrupts could not pay their debts in the ordinary course of business, that is, *in money*, as they fell due, they were insolvent, and if the defendants did not know that this constituted insolvency within the meaning of the bankrupt act, it was because they were ignorant of the law."

But that court examined all the testimony, and in affirming the decree of the District Court rested the case upon it, as well as upon this answer. From the decree of the Circuit Court, Toof, Phillips & Co. brought the case here.

Mr. A. H. Garland for the plaintiffs in error.

Messrs. Watkins and Rose, contra.

Mr. Justice FIELD delivered the opinion of the court.

The bill presents a case within the provisions of the first clause of the thirty-fifth section of the bankrupt act. That clause was intended to defeat preferences to a creditor, made by a debtor when insolvent or in contemplation of insolvency. It declares that any payment or transfer of his property made by him whilst in that condition,

within four months previous to the filing of his petition, with a view to give a preference to a creditor, shall be void if the creditor has at the time reasonable cause to believe him to be insolvent, and that the payment or transfer was made in fraud of the provisions of the bankrupt act. And it authorizes in such case the assignee to recover the property or its value from the party who receives it.

Under this act it is incumbent on the complainant, in order to maintain the decree in his favor, to show four things:—

1st. That at the time the conveyances to Toof, Phillips & Co. and Mahan were made the bankrupts were insolvent or contemplated insolvency;

2d. That the conveyances were made with a view to give a preference to these creditors;

3d. That the creditors had reasonable cause to believe the bankrupts were insolvent at the time; and,

4th. That the conveyances were made in fraud of the provisions of the bankrupt act.

1st. The counsel of the appellants have presented an elaborate argument to show that inability to pay one's debts at the time they fall due, *in money*, does not constitute insolvency, within the provisions of the bankrupt act. The argument is especially addressed to language used by the district judge when speaking of the statement of the appellants in answer to one of the interrogatories of the bill, to the effect that at the time the transfers were made they did not believe the bankrupts were able to pay their debts *in money*, but were able to do so on a fair market valuation of their property and assets. The district judge held that this was a direct confession of a fact which in law constitutes insolvency, and observed that "if the bankrupts could not pay their debts in the ordinary course of business, that is, in money, as they fell due, they were insolvent."

The rule thus laid down may not be strictly correct as applied to all bankrupts. The term "insolvency" is not always used in the same sense. It is sometimes used to denote the insufficiency of the entire property and assets of an individual to pay his debts. This is its general and popular meaning. But it is also used in a more restricted sense, to express the inability of a party to pay his debts, as they become due in the ordinary course of business. It is in this latter sense that the term is used when traders and merchants are said to be insolvent, and as applied to them it is the sense intended by the act of Congress. It was of the bankrupts as traders that the district judge was speaking when he used the language which is the subject of criticism by counsel.

With reference to other persons not engaged in trade or commerce the term may perhaps have a less restricted meaning. The bankrupt act does not define what shall constitute insolvency, or the evidence of insolvency in every case.

In the present case the bankrupts were insolvent in both senses of

the term at the time the conveyances in controversy were made. They did not then possess sufficient property, even upon their own estimation of its value as given in their schedules, to pay their debts. These exceeded the estimated value of the property by over twenty thousand dollars. And for months previous the bankrupts had failed to meet their obligations as they matured. Creditors had pressed for payment without success; their stock of goods had been levied on, and their store closed by the sheriff under an execution on a judgment against one of them. It would serve no useful purpose to state in detail the evidence contained in the record which relates to their condition. It is enough to say that it abundantly establishes their hopeless insolvency.

2d. That the conveyances to Toof, Phillips & Co. were made with a view to giving them preference over other creditors hardly admits of a doubt. The bankrupts knew at the time their insolvent condition. A month previous they had made up a balance sheet of their affairs which showed that their assets were insufficient to pay their debts. They had contemplated going into bankruptcy in December previous, and were then pressed by numerous creditors for payment. Their indebtedness at the time exceeded \$50,000, and except to Toof, Phillips & Co. they did not pay upon the whole of it over \$500 during the previous fall and winter. Making a transfer of property to these creditors, under these circumstances, was in fact giving them a preference, and it must be presumed that the bankrupts intended this result at the time. It is a general principle that every one must be presumed to intend the necessary consequences of his acts. The transfer, in any case, by a debtor, of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts.¹ The burden of proof is upon him in such case, and not upon the assignee or contestant in bankruptcy.

No such proof was made or attempted in this case. But, on the contrary, the evidence shows that the conveyances were executed upon the expectation of the bankrupts, and upon the assurance of Toof, Phillips

¹ *Re Black*, 2 Ben. 196. *Campbell v. Traders' Nat. Bank*, 2 Biss. 423; *Re Batchelder*, 1 Low. 373; *Catlin v. Hoffman*, 2 Sawy. 486; *Webb v. Sachs*, 15 B. R. 168; *Hill v. McGregor*, 23 Blatch. 312; *Re Piper*, 2 N. B. N. 7; *Griffin Factory v. Helms Co.*, 2 N. B. N. 630 (referee); *Re Rome Planing Mill*, 96 Fed. Rep. 812; *Re McGee*, 105 Fed. Rep. 895; *Pepperdine v. Nat. Exchange Bank*, 84 Mo. App. 234, *acc.*

It is consequently immaterial whether the debtor was induced to make the payment by threats or pressure of the creditor. *Clarion Bank v. Jones*, 21 Wall. 325; *Arnold v. Maynard*, 2 Story, 349; *Re Batchelder*, 1 Low. 373; *Giddings v. Dodd*, 1 Dill. 115; *Hill v. McGregor*, 23 Blatch. 312; *Strain v. Gourdin*, 11 B. R. 156. But in *Re Frantzen*, 20 Fed. Rep. 785, and *McMeichen's Lessee v. Grundy*, 3 H. & J. 185, the motives of the bankrupt were treated as material.

and Co., that in consequence of them they would continue to sell the bankrupt's goods on credit, as they had previously done; and that no arrangement was made by the bankrupts with any other of their creditors, either for payment or security, or for an extension of credit.

The fact that the title-bond was assigned, and the property for which it was given was conveyed to Mahan alone, and not to Toof, Phillips & Co., does not change the character of the transaction. Mahan was a member of that firm, and the conveyance was made to him with the understanding that the sum mentioned as its consideration should be credited on the indebtedness of the bankrupts to them. Both of the bankrupts testified that such was the understanding at the time. The pretence that Mahan bought the lots as an investment on private account will not bear the slightest examination. It is in proof that the lots at the time were only worth \$4,000 at the outside, yet the consideration given was early \$7,000. Toof, Phillips & Co. might well have been willing to credit this amount on their claim against insolvent traders in consideration of obtaining from them the possession of property of much less value, but it is incredible that an individual, seeking an investment of his money, would be careless as to the difference between the actual value of the property and the amount paid as a consideration for its transfer to him.

8d. From what has already been said it is manifest not only that the bankrupts were insolvent when they made the conveyances in controversy, but that the creditors, Toof, Phillips & Co., had reasonable cause to believe that they were insolvent. The statute, to defeat the conveyances, does not require that the creditors should have had absolute knowledge on the point, nor even that they should, in fact, have had any belief on the subject. It only requires that they should have had reasonable cause to believe that such was the fact. And reasonable cause they must be considered to have had when such a state of facts was brought to their notice in respect to the affairs and pecuniary condition of the bankrupts as would have led prudent business men to the conclusion that they could not meet their obligations as they matured in the ordinary course of business. That such a state of facts was brought to the notice of the creditors is plainly shown. Chetlain, one of the bankrupts, testifies that previous to the execution of the conveyances he had several conversations with Mahan respecting their finances, and told him the amount or near the amount of their indebtedness, and that they could not pay it. Mahan advised them to get extensions, and said that he would help them to get through. Chetlain also testifies that such was the state of the finances of the bankrupts that on one occasion, in conversation with Mahan, they offered to turn over to him their entire assets if he would assume their liabilities and give them a receipt, and that he declined the offer.

It also appears in evidence that the levy by the sheriff upon the stock of goods of the bankrupts, already mentioned, which was made in January, 1868, caused a temporary suspension of their business, and that

Mahan was in Augusta at the time and had an interview with the bankrupts on the subject of the levy.

It also appears that about the last of December, 1867, or the first of January, 1868, Toof, Phillips & Co. sent notes of the bankrupts which they held to an agent in Augusta for collection. The agent presented the notes for payment to the bankrupts and was told by them that they could not pay the notes at that time. The agent then wrote to Toof, Phillips & Co. that they had better look to their interests, as his conviction was that it was doubtful whether they would be able to collect their debts. Shortly after this Mahan went to Augusta to look after the matter, and whilst there the conveyances in controversy were made.

It is impossible to doubt that Mahan ascertained, while thus in Augusta, the actual condition of the affairs of the bankrupts. The facts recited were sufficient to justify the conclusion that they were insolvent, or at least furnished reasonable cause for belief that such was the fact.

4th. It only remains to add that the creditors, Toof, Phillips & Co., had also reasonable ground to believe that the conveyances were made in fraud of the provisions of the bankrupt act. This, indeed, follows necessarily from the facts already stated. The act of Congress was designed to secure an equal distribution of the property of an insolvent debtor among his creditors, and any transfer made with a view to secure the property, or any part of it, to one, and thus prevent such equal distribution, is a transfer in fraud of the act. That such was the effect of the conveyances in this case, and that this effect was intended by both creditors and bankrupts, does not admit, upon the evidence, of any rational doubt. A clearer case of intended fraud upon the act is not often presented.

Decree affirmed.

Mr. Justice BRADLEY was absent from the court when this case was submitted, and consequently took no part in its decision.

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SECTION II. (continued).

(c) REASONABLE CAUSE TO BELIEVE THAT IT WAS INTENDED TO GIVE A PREFERENCE.

MERCHANTS' NATIONAL BANK v. COOK.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1877.

[Reported in 95 United States, 342.]

MR. JUSTICE HUNT delivered the opinion of the court.

This action is brought by the assignees of B. Homans, Jr., to recover from the Merchants' Bank certain securities, or their value, received by the bank from Homans. The securities are alleged to have been received in violation of the thirty-fifth section of the bank-

rupt act. That Homans was insolvent when the securities were delivered is not denied, but the bank insists that it had no reasonable cause to believe that such was his condition.

On the morning of August 25, 1869, the bank advanced to Homans, upon his check on New York, the sum of \$10,000, less the usual charge of one-eighth of one per cent. In the afternoon of the same day, Homans became satisfied that his failure could no longer be averted, and that his check thus given would not be paid. He therefore placed in an envelope addressed to the bank the securities in question, with the following note:—

"HOMANS & CO., BANKERS, No. 23 W. THIRD ST.,
"CINCINNATI, Aug. 25, 1869.

"D. I. FALLIS, Esq., Pr.

"DEAR SIR, — A disappointment gives us reason to fear that our check of this date may not be paid. I leave with you the enclosed as security.

B. HOMANS, Jr."

On the morning of the 26th, his banking-house was opened for business as usual, Homans himself being present. At nine o'clock A. M. he left his office for Covington, where he lived, instructing Mr. Wood, one of his clerks, that if he did not return at ten o'clock to deliver the envelope addressed to the Merchants' Bank, and another of a like character to another bank. Homans did not return that day; but at ten or half-past ten o'clock, Mr. Albert, another clerk, received directions from him to close the doors, take no more deposits, and pay no more checks. Mr. Albert immediately locked the doors, and, receiving the package from Mr. Wood, at once delivered it to the bank. Upon these facts, with one exception as to time, the matter

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257- 231 — 5-13
259- 192 — 138
263- 229 — 435
268- 225 — 178
272- 209 — 365
275- 228 — 534
277- 210 ~~Tues~~ 768
278- 148 ~~Tues~~ 475
283- 130 ~~Tues~~ 315

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The president of the Merchants' Bank testifies that he found the envelope on his desk in the bank when he came to the bank at about eight o'clock in the morning, and is quite confident that it could not have been later than half-past eight when he became aware of its contents. On the point of time he may easily have fallen into an error; and, we think, there can be no doubt of his mistake. Mr. Homans testifies that he left the banking-house at nine A. M. to go to Covington, and then gave instructions to Mr. Wood, a clerk, to deliver the envelope, if he did not return by ten o'clock. Mr. Albert also testifies that the banking-office of Homans was opened at nine o'clock, and continued open for about an hour; that he then received orders from Mr. Homans to close the doors; that he did so, and, in pursuance of directions then received from Mr. Wood, proceeded to deliver this envelope, with a similar one to another bank; and that this delivery was made at ten or half-past ten o'clock.

Mr. Yergason, the cashier of the Merchants' Bank, presented at Homans's office a clearing-house check, and payment thereof was refused. Mr. Albert testifies that this check was presented and payment demanded by the cashier after the doors were closed and after

the envelope had been delivered at the bank. Mr. Fallis testifies to the same purport, and that this demand and refusal was made between nine and ten o'clock in the morning.

That Homans intended to give the bank a preference over other creditors, — that is, that he expected and intended by means of the enclosures sent that the bank should receive the full amount of its \$10,000 check, while other creditors would receive but a portion of their debts, — is too evident to require discussion. Mr. Homans states in explicit terms that he was at that time aware of his inability to pay his creditors in full then or in the future.

The important question remains, Had the Merchants' Bank, when it received the packages, reasonable cause to believe that Homans was insolvent? If it had, the thirty-fifth section of the bankrupt act declares the transaction to be void. If it had not, it may lawfully hold the securities or their avails.

The president of the bank testifies that there was nothing in the note sent with the securities, or in the transaction itself, that led him to suspect the insolvency of Homans. While it is impossible certainly to indicate the operation of the human mind, we cannot but think the witness is again at fault in his recollection, and that his idea at the time of testifying was not the one that controlled his action when the occurrence took place.

1. The transaction, on the theory of the solvency of Homans, is quite inexplicable. It was the general practice of these parties, as of all bankers in their city, to deal in exchange on New York. The practice was thus: The Merchants' Bank wanted \$10,000 to be used in the city of New York. Mr. Homans had the money there, which he did not need for his own purposes. The bank gives him \$10,000 in currency, less the difference in exchange, and takes his check on his banker in New York for the sum named. This is the theory of the transaction. In fact Homans had no funds in New York, but gave his check that he might obtain the currency to be used to meet pressing demands at home. The theory of the bank, however, was as is above stated.

That a banker in Cincinnati, having sold a sight-draft on New York, should the next day, without agreement or solicitation, send to the holder collaterals to secure the payment of the draft, would be an extraordinary transaction, and, in the language of Mr. Cook, president of the Fourth National Bank of Cincinnati, it would be a taint upon the standing of the drawer, and would at once impress one with the idea that the drawer was insolvent, or in great financial difficulty. Such is the evidence also of Mr. Griffiths and Mr. Espy, bankers of the same place. The giving of security under such circumstances is in repugnance to the idea of the whole transaction, which is that of a quick and simple commercial exchange of funds. One who lends money on bond or time notes may well expect and take security for their payment. It is in harmony with the transaction. But if a check is taken in payment of an account presented, no one would expect to receive collateral

security for its payment. It would not, however, be more incongruous, or more inharmonious, than the giving of collateral security for the payment of the draft in question. The giving and acceptance of the collateral could have but one significance to the mind of a banker.

2. The letter accompanying the collaterals, we think, gave a notice which a business man could not misunderstand, especially in connection with the fact, known to the bank, that a short time prior thereto there were evidences that Homans was in need of money, and that there were clearing-house checks to a large amount outstanding against him. The letter enclosed said: "A disappointment gives us reason to fear that our check of this date may not be paid. I leave with you the enclosed as security." Its language is expressive to a business man. It means, not that we fear our check may not be paid, but that it will not be paid. We are disappointed in obtaining the funds to pay it.

This disappointment is not the result of an accident or of a misunderstanding, for that apology would have been given if it existed; nor is the disappointment a temporary one, for that would have been stated if true. We do not expect to be able to pay it, and we enclose you securities, which will not indeed give the money to which you are entitled, but will protect you from ultimate loss. This is what the letter means. It is a statement of inability from want of funds to meet a current and most pressing debt, either in New York or in Cincinnati, the non-payment of which involved public suspension and bankruptcy. Practically it was so understood, for we find —

3. That immediately upon its receipt the Merchants' Bank sent for payment its clearing-house check, previously unrepresented. The testimony of Mr. Albert shows that the Merchants' Bank was not in the habit itself of presenting clearing-house checks, but that, in about fifteen minutes after he had left the envelope and securities at the bank, Mr. Yergason, the cashier, in person presented the clearing-house check and requested its payment. The relation of cause and effect is a more rational explanation of this speedy demand than to suppose it to be a mere coincidence.

It is scarcely necessary to discuss the authorities as to the meaning of the words "having reasonable cause to believe the party to be insolvent." When the condition of a debtor's affairs is known to be such that prudent business men would conclude that he could not meet his obligations as they matured in the ordinary course of business, there is reasonable cause to believe him to be insolvent. Knowledge is not necessary, nor even a belief, but simply reasonable cause to believe. Toof v. Martin, 13 Wall. 40; Buchanan v. Smith, 16 Wall. 277; Wager v. Hall, *ibid.* 584.

There is nothing in the subsequent decisions of this court to vary these principles, and it is not worth while to go through the English cases founded upon a statute containing different language from our own.

Upon the whole case, we are all of the opinion that the court below decided correctly in holding that Homans was insolvent; that the securities were transferred with a view to give a fraudulent preference; and that the bank had reasonable cause to believe that Homans was insolvent when it received and appropriated the securities presented to it.

Decree affirmed.

IN RE EGGERT.

CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, JUNE 15, 1900.

[Reported in 102 Federal Reporter, 735.]

BEFORE WOODS, JENKINS, and GROSSCUP, Circuit Judges.

JENKINS, Circuit Judge. . . . [In regard to the definition of "insolvency"] the act is widely different from the bankrupt act of 1867. There the term "insolvency" was construed to mean an inability to meet one's obligations as they matured in the ordinary course of business. The term "insolvency" in the present act is equivalent to the term "bankruptcy" in the former act. While, therefore, rulings under the former act are inapplicable in a certain sense, because of this difference in the meaning of the term "insolvency," they do apply so far as they determine the principles of law by which it is to be ascertained whether a creditor receiving a preference had reasonable cause to believe that the debtor had not at the time property sufficient, at a fair valuation, to pay all of his debts. In the leading case of *Grant v. Bank*, 97 U. S. 80, 81, 24 L. Ed. 972, it was said: —

"It is not enough that a creditor has some cause to suspect the insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicions a ground of nullity in such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further, he may feel anxious about his claim and have a strong desire to secure it, and yet such belief as the act requires may be wanting. Obtaining additional security or receiving payment of a debt under such circumstances is not prohibited by the law. Receiving payment is put in the same category, in the section referred to, as receiving security. Hundreds of men constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases if mere grounds of suspicion of their solvency were sufficient for the

purpose. The debtor is often buoyed up by the hope of being able to get through with his difficulties long after his case is in fact desperate, and his creditors, if they know anything of his embarrassments, either participate in the same feeling, or at least are willing to think that there is a possibility of his succeeding. To overhaul and set aside all his transactions with his creditors, made under such circumstances, because there may exist some grounds of suspicion of his inability to carry himself through, would make the bankrupt law an engine of oppression and injustice. It would in fact have the effect of producing bankruptcy in many cases where it might otherwise be avoided."

In *Barbour v. Priest*, 103 U. S. 293, 296, 26 L. Ed. 480, it is said :

"The obvious meaning of this provision is to require the concurrence of the creditor who gets security for his debt in the purpose of defeating the bankrupt act. Such person must have reasonable cause to believe the grantor in the conveyance was insolvent at the time it was executed, and that it was made with intent to defeat the bankrupt law. Both these must exist as facts which the grantee had reasonable cause to believe. And so careful was Congress to protect the rights acquired by an honest creditor, that, unless bankrupt proceedings are commenced by or against the debtor within four months after such a preference, it should stand good, though the creditor knew the debtor was insolvent, and knew that the conveyance was intended to defeat the purpose of the bankrupt law in securing equality of distribution of the debtor's property. And this period was reduced by the act of 1874 to two months. It has never been denied, so far as we are advised, that it is necessary for the assignee of the bankrupt, in attacking such a conveyance, to prove the existence of this reasonable cause of belief of the debtor's insolvency in the mind of the preferred party."

In *Stucky v. Bank*, 108 U. S. 74, 2 Sup. Ct. 219, 27 L. Ed. 640, the court reaffirmed the doctrine of *Grant v. Bank*, and observed that :—

"A creditor dealing with a debtor who he may suspect to be in failing circumstances, but of which he has no sufficient evidence, may receive payment or security without violating the bankrupt law. He may be unwilling to trust him further, he may feel anxious about his claim and have a strong desire to secure it, yet such belief as the act requires may be wanting. Obtaining additional security or receiving payment of a debt under such circumstances is not prohibited by law."

In the earlier case of *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481, the court, discussing the character of evidence necessary to establish a reasonable cause to believe, observes :—

"It is a general principle that every one must be presumed to intend the necessary consequences of his acts. The transfer, in any case, by a debtor, of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal

distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such case, and not upon the assignee or contestant in bankruptcy."

And on page 42, 13 Wall., and page 483, 20 L. Ed. : —

"The statute, to defeat the conveyances, does not require that the creditors should have had absolute knowledge on the point, or even that they should in fact have had any belief on the subject. It only requires that they should have had reasonable cause to believe that such was the fact. And reasonable cause they must be considered to have had when such a state of facts was brought to their notice in respect to the affairs and pecuniary condition of the bankrupts as would have led prudent business men to the conclusion that they could not meet their obligations as they matured in the ordinary course of business."

In *Buchanan v. Smith*, 16 Wall. 227, 308, 21 L. Ed. 286, the court says : —

"Insolvency, in the sense of the bankrupt act, means that the party whose business affairs are in question is unable to pay his debts as they become due in the ordinary course of his daily transactions, and a creditor may be said to have reasonable cause to believe his debtor to be insolvent when such a state of facts is brought to his notice respecting the affairs and pecuniary condition of his debtor, in a case like the present, as would lead a prudent business man to the conclusion that he (the debtor) is unable to meet his obligations as they mature in the ordinary course of business. Such a party (that is, a creditor securing a preference from his debtor over the other creditors of the debtor) cannot be said to have had reasonable cause to believe that his debtor was insolvent at the time, unless such was the fact, but if it appears that the debtor giving the preference, whether a merchant or trading company, was actually insolvent, and that the means of knowledge upon the subject were at hand, and that such facts and circumstances were known to the creditor securing the preference as clearly ought to have put him, as a prudent man, upon inquiry, it would seem to be a just rule of law to hold that he had reasonable cause to believe that the debtor was insolvent, if it appears that he might have ascertained the fact by reasonable inquiry. Ordinary prudence is required of a creditor under such circumstances, and, if he fails to investigate when put upon inquiry, he is chargeable with all the knowledge it is reasonable to suppose he would have acquired if he had performed his duty."

In *Wager v. Hall*, 16 Wall. 584, 600, 21 L. Ed. 506, the court says :

"Nothing remains, therefore, to be re-examined, except the issue whether the respondents had reasonable cause to believe that the

mortgagor was insolvent, and that the conveyance was made in fraud of the provisions of the bankrupt act. Proof that the respondents had actual knowledge that the mortgagor was insolvent at the time is not required to support the prayer for relief, but the allegation in that behalf is sustained if it appears that they had reasonable cause for such belief, as that is the language of the bankrupt act. Actual knowledge of the alleged fact is not made the criterion of proof in such an issue, nor is it necessary that it should appear that the respondents actually believed that the mortgagor was insolvent, but the true inquiry is whether they, as business men acting with ordinary prudence, sagacity, and discretion, had reasonable cause to believe that the debtor was insolvent, in view of all the facts and circumstances known to them at the time the conveyance was made. Unless the debtor was in fact insolvent, it cannot be held that such a grantee had reasonable cause to believe the allegation, but if it appears that the debtor was in fact insolvent as alleged, and that the means of knowledge were at hand, and that such facts and circumstances were known to the grantee as were clearly sufficient to put a person of ordinary prudence and discretion upon inquiry, it is well settled that it would be his duty to make all such reasonable inquiries to ascertain the true state of the case. Purchasers are required to exercise ordinary prudence in respect to the title of the seller, and if they fail to investigate when put upon inquiry, they are chargeable with all the knowledge which it is reasonable to suppose they would have acquired if they had performed their duty in that regard. Creditors have reasonable cause to believe that a debtor, who is a trader, is insolvent when such a state of facts is brought to their notice respecting the affairs and pecuniary condition of the debtor as would lead a prudent business man to the conclusion that he is unable to meet his obligations as they mature in the ordinary course of business. All experience shows that positive proof of fraudulent acts between debtor and creditor is not generally to be expected, and it is for that reason, among others, that the law allows, in such controversies, a resort to circumstances as the means of ascertaining the truth, and the rule of evidence is well settled that circumstances altogether inconclusive, if separately considered, may by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof, which is a rule clearly applicable to the facts and circumstances disclosed in this record."

In *Dutcher v. Wright*, 94 U. S. 553, 557, 24 L. Ed. 131, the court says: —

"Insolvency, in the sense of the bankrupt act, means that the party whose business affairs are in question is unable to pay his debts as they become due in the ordinary course of his daily transactions; and a creditor may be said to have reasonable cause to believe his debtor to be insolvent when such a state of facts is brought to his notice respecting the affairs and pecuniary condition of his debtor as would

lead a prudent man to the conclusion that the debtor is unable to meet his obligations as they mature in the ordinary course of his business. Reasonable cause for such belief cannot arise unless the fact of insolvency actually existed; but if it appears that the debtor giving the preference was actually insolvent, and that the means of knowledge were at hand, and that such facts and circumstances were known to the creditor securing the preference as clearly ought to have put a prudent man upon inquiry, it must be held that he had reasonable cause to believe that the debtor was insolvent, if it appears that he might have ascertained the fact to be so by reasonable inquiry."

In *Bank v. Cook*, 95 U. S. 343, 346, 24 L. Ed. 414, the court says:

"It is scarcely necessary to discuss the authorities as to the meaning of the words 'having reasonable cause to believe the party to be insolvent.' When the condition of a debtor's affairs is known to be such that prudent business men would conclude that he could not meet his obligations as they matured in the ordinary course of business, there is reasonable cause to believe him to be insolvent. Knowledge is not necessary, nor even a belief, but simply reasonable cause to believe."

The supposed conflict between these cases is imaginary, not real. In *Grant v. Bank*, and the cases subsequent in point of time, the court was dealing with the facts spread upon the record, and did not find occasion to consider the facts and circumstances which, brought home to the creditor, would put him upon inquiry of his debtor's financial condition. In the cases antedating *Grant v. Bank* the question of notice arose and was considered. The resultant of all these decisions we take to be this: That the creditor is not to be charged with knowledge of his debtor's financial condition from mere nonpayment of his debt, or from circumstances which gave rise to mere suspicion in his mind of possible insolvency; that it is not essential that the creditor should have actual knowledge of, or belief in, his debtor's insolvency, but that he should have reasonable cause to believe his debtor to be insolvent; that if facts and circumstances with respect to the debtor's financial condition are brought home to him, such as would put an ordinarily prudent man upon inquiry, the creditor is chargeable with knowledge of the facts which such inquiry should reasonably be expected to disclose. In applying this principle to the present case, we encounter a difficulty not present in the cases referred to. By the terms of the statute which authorizes the present petition, we are restricted to a review in matter of law merely, and are bound by the facts found by the court below. We can only ascertain and determine whether the facts found sanctioned the judgment of the lower court. The facts established are within narrow compass. They are that Eggert was insolvent; that he had failed to meet his obligations promptly as they matured; that, by the rules of the association of which the Rundle-Spence Manufacturing Company was a member, Eggert was not, while such debt remained unprovided for, entitled to purchase

goods upon credit, but only for cash; that the assignment of the claim against the city was not given or received by collusion of debtor and creditor. The finding is somewhat wanting. There is failure to find that Eggert himself was conscious of his insolvency. The aggregate of his assets and of his liabilities is not given. The only fact brought home to the creditor, and which it is claimed should have aroused inquiry, is that he was somewhat behind in the prompt payment of his obligation. We cannot say, as a conclusion of law, that knowledge of that fact standing alone was sufficient to put the creditor upon inquiry. Indeed, it may be said that a majority of merchants absolutely solvent in the sense in which the term is employed in the bankrupt act, are not at all times able to promptly meet their obligations as they mature. To hold that a creditor receiving payment of or security for a past-due debt is, by the mere fact of knowledge that the debt is past maturity, put upon inquiry of his debtor's inability to pay all his debts, and that under such circumstances he received payment or security at his peril, would be to put at hazard many business transactions and make the act oppressive. The fact of such inability, coupled with other facts and circumstances brought home to the creditor, might be sufficient to put him on inquiry; but this is the only fact from which the deduction is sought that the creditor had reasonable cause to believe his debtor insolvent, and, standing alone, it is insufficient to raise an inference of law that the creditor is chargeable with knowledge of the facts which inquiry would have elicited. The question whether one has reasonable cause to believe is essentially a question of fact, possibly of mixed fact and law. In actions at law the question, under proper instructions from the court, is one for the jury (*Forbes v. Howe*, 102 Mass. 427, 436); and in suits in equity, one for the court, as was the case in all the decisions above referred to. In *Wilson v. Bank*, 17 Wall. 473, 487, 21 L. Ed. 728, the court recognizes that the question is one of fact for the court or jury, and observed thereupon as follows:—

“Undoubtedly very slight evidence of an affirmative character of the existence of a desire to prefer one creditor, or of acts done with a view to secure such preference, might be sufficient to invalidate the whole transaction. Such evidence might be sufficient to leave the matter to a jury, or to support a decree, because the known existence of a motive to prefer or to defraud the bankrupt act would color acts or decisions otherwise of no significance. These cases must rest on their own circumstances. But the case before us is destitute of any evidence of the existence of such a motive, unless it is to be imputed as a conclusion of law from facts which we do not think raise such an implication.”

The referee found that the creditor had no knowledge of the fact that the debtor was insolvent, and had no reasonable cause to believe that it was intended by the transfer to give a preference. This is inaccurately stated as a conclusion of law. The action of an

ordinarily prudent man under given circumstances is necessarily a question of fact, rather than one of law. We are bound by the finding of the court below.

The contention that the facts found showed the transaction to be a scheme to hinder, delay, or defraud creditors within the meaning of section 67e, is without merit. The term "hinder, delay, or defraud creditors" had a well-defined and recognized meaning at the common law, and has that signification as employed in the act. The payment or securing to a creditor of an honest debt by the debtor is not to hinder, delay, or defraud creditors, within the well-established signification of the term.

It may be doubtful if Congress designed to allow a review by this court upon original petition in cases in which an appeal is allowed, since the petition is only another mode of appeal for review of the action of the bankruptcy court, although limited to matter of law. It would seem more probable that this mode of review was intended to apply only to cases in which the right of appeal is withheld, since the remedy, whether by appeal or by petition, is summary and effective. We suggest, but do not find it needful to determine, the question. Being unable to say, as a conclusion of law, that mere knowledge that the debtor was behind in his payments puts the creditor upon inquiry, and charges him with notice of the facts which such inquiry might disclose, and being bound by the facts found by the court below, we are constrained to deny the petition.

SECTION II. (*continued*).

(d) SUFFERED OR PERMITTED.

DUNCAN v. LANDIS.

CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT,
FEBRUARY, 7, 1901.

[Reported in 106 *Federal Reporter*, 839.]

BEFORE DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

GRAY, Circuit Judge. In the court below an issue was tried by a jury to determine whether Sallie E. Duncan, the appellant, who is one of the plaintiffs in error, had committed a certain act of bankruptcy charged against her.

Sallie E. Duncan, the appellant, did business in the city of Williamsport, Pa., under the name of the Duncan Department Store; her husband, James M. Duncan, being her general agent and business manager.

In April, 1896, certain promissory notes in favor of Theodore H. Gehly, Gandor & Munson, and the first National Bank of Williamsport, with warrants of attorney to confess judgment, were executed and given by Sallie E. Duncan to the parties named. On December 31, 1898, by virtue of the said warrants, judgments were entered in the Court of Common Pleas of Lycoming County against the said Sallie E. Duncan for sums aggregating \$8,228.67. Executions were issued thereon, and levy made by the sheriff upon the property of the defendant. Sallie E. Duncan was also indebted to other creditors in the sum of \$7,300. These other creditors, or some of them, filed a petition in the court below on January 7, 1899, praying that the said Sallie E. Duncan should be adjudged a bankrupt, upon the ground that within four months next preceding the date of their petition she had committed an act of bankruptcy, in that she did on the 31st day of December, 1898, suffer and permit, while insolvent, certain of her creditors to obtain a preference through legal proceedings, and had not, within five days before the time fixed by the sheriff for the sale of her property levied upon by him, vacated and discharged such preference.

The position taken by the District Court in its instruction to the jury was that the mere action of the plaintiffs in said judgment in entering the same and issuing executions thereon upon the authority of warrants of attorney given by Sallie E. Duncan more than two and a half years before, and before the passage of the bankrupt act, constituted a suffering or permitting by her of the obtaining of a preference by such creditors at the time of such entry and levying of execution, within the meaning of the bankrupt act, because she did not within "five days," etc., vacate or discharge such preference; and this though, as is assumed, the said Sallie E. Duncan, not only did no act to initiate or facilitate the proceedings of the creditors subsequent to the giving of the judgment notes, but could not have controlled, hindered, or delayed such proceedings. We do not agree with the learned judge in this construction of the bankrupt act. If sanctioned, it perverts or ignores the common and ordinary meaning of English words, and deprives the debtor of the protection which those words, in their common, everyday signification, would give, and, we must assume, were intended to give. Section 3 of the act of 1898 deals with and describes acts of bankruptcy. It is to be observed that the section expressly states that it deals with and concerns acts of the debtor. Unquestionably, clauses 1, 2, 4, and 5 require a voluntary act. The question, then, is whether clause 3 does not require the same. It certainly does, unless it is an exception to the general scheme of the section. The grammatical structure of the section is that of a single sentence, in which the numbered clauses all depend upon and relate to the opening clause, viz., "acts of bankruptcy by a person shall consist of his having" done certain things. An act signifies something done voluntarily by a person. An act is the result of an exercise of the will. Black's Law Dictionary says:—

"In a more technical sense, it means something done voluntarily by

a person, and of such a nature that certain legal consequences attach to it. Thus, a grantor acknowledges a conveyance to be his 'act and deed,' the terms being synonymous."

The act with which we are here concerned is the debtor's having suffered or permitted, while insolvent, a creditor to obtain a preference, etc. Both the words, "suffer" and "permit," while they do not necessarily connote strong affirmative action, do involve such an exercise of the will as effects results. The "suffering or permitting" a creditor to obtain a preference, within the meaning of clause 3, may consist of connivance between the debtor and creditor. But in any event there must be some act of the will on the part of the debtor, whether by way of active procurance or voluntary acquiescence. Slight evidence of an affirmative character might suffice to establish such connivance or acquiescence, but there must be some. *Noscitur a sociis* is an established rule in the interpretation of statutes. "Associated words are understood to be used in their cognate sense." There can be no doubt that the word "suffer" is here a synonym of "permit." It is the active and transitive verb, and not the intransitive. Its meaning as here used is that given by all lexicographers, Webster defining it thus: "(4) To allow; to permit; not to forbid or hinder; to tolerate. 'I suffer them to enter and possess.' Milton." Worcester gives as one of the meanings: "(3) To allow; to admit; to permit. 'God is faithful, who will not suffer you to be tempted above that ye are able.' I Cor. x. 13." The Century gives as one meaning of the word: "To refrain from hindering; allow; permit; tolerate. 'Suffer the little children to come unto me, and forbid them not.' Mark, x. 14." There can be no doubt, then, that "suffer" or "permit," as used in this section, denotes a voluntary act of the debtor. They do not denote or describe acts of the creditor. The debtor must by this act consciously and voluntarily in some degree co-operate with the creditor in "obtaining" the preference. He cannot suffer or permit what he cannot hinder. A preference obtained under such circumstances is not his act, and the consequence of bankruptcy, as denounced in this section, attaches only to his act. In the case before us, Sallie E. Duncan, the debtor, undoubtedly, to use the language of the district court for the Western district of Wisconsin in *Re Nelson*, 98 Fed. 76, "had a right to give a note, with warrant of attorney, so long before the bankrupt law was passed; and, having given it upon good consideration, it was not in [her] power to prevent the entry of a judgment against [her]. What was not in [her] power to prevent, [she] could hardly be said to have suffered or procured."

It seems to us that the learned judge in the court below, in the instruction to the jury above quoted, has entirely failed to give force and effect to the plain English words of section 3 of the bankrupt act just commented on. He in fact makes the act of bankruptcy consist entirely of the debtor not vacating or discharging a preference, however obtained, whereas in this third clause of the third section the act of

bankruptcy is made to consist of the voluntary act connoted by "suffer" or "permit," as already explained, coupled with the failure of the debtor to vacate or discharge within five days, etc., the preference thus suffered or permitted; the plain and obvious meaning of this clause being that, even though the debtor has suffered or permitted a preference to be obtained, it still will not be considered an act of bankruptcy, if within the five days, etc., he "vacates or discharges" the same. In making this contention that the failure of the debtor to vacate or discharge a preference, however obtained, constitutes an act of bankruptcy, the appellees seem to admit that the failure spoken of in the act means omitting to do something which the debtor was able to do; for when it is pointed out that a judgment from which a preference results has been obtained upon a valid cause of action, that there was no legal defence, that it was regularly entered and no exception was possible to its record, and that the debtor was not able to discharge it by payment, the reply is made, not that it is a matter of no consequence whether he was able to do any of these things or not, but another thing, which he unquestionably is able to accomplish, is mentioned, viz. voluntary bankruptcy. This reply is made upon the authority of several cases in the district courts, one of them stating the matter thus:—

"If neither of these weapons is available, he has still at command one sufficient weapon, of which he cannot be deprived: he can apply promptly to the Court of Bankruptcy, and ask that his property shall be ratably divided among his creditors. If he fails to move, his inaction is properly regarded as a confession that he is hopelessly insolvent, and as conclusive proof that he consents to the preference that he has declined to strike down."

It may be remarked in passing that in the case of a corporation the "weapon" of voluntary bankruptcy is not available.

There is in the language above quoted the implication of a further, somewhat inconsistent, admission that, in view of the natural and ordinary meaning of the words "suffer or permit," there was a necessity to seek for some evidence of the exercise of the debtor's will; and this, it is asserted, is found in the debtor's failure to voluntarily ask to be declared a bankrupt, in order to vacate or discharge the preference obtained, in cases where no other way of discharging such preference is open to him. If the element of the debtor's will be necessary to the "vacating or discharging" of the preference, it is hard to see why it should be taken away from the words "suffer or permit," as used in the former part of the clause under consideration. It would be more consistent to eliminate it in both cases. The construction of clause 3, according to the contention of the appellees, would then be that the bankruptcy of the debtor has no relation to his act, but depends alone upon the result and effect of the creditor's act in obtaining a preference, and likewise upon the result or effect of the preference not having been discharged by the debtor, irrespective of his ability to so discharge the same. But, as already explained, the appellees admit the necessity of

importing the will of the debtor into the failure to discharge or vacate, by the suggestion that, if there are no other means to legally vacate or discharge the preference, still it is open to him to exercise his volition to become a voluntary bankrupt. As we cannot hold the debtor as for a duty to "vacate or discharge," where he has no ability to do either, so as to avoid the consequence of bankruptcy, no more can we hold that he "suffered or permitted" the obtaining of a preference which he could not legally have hindered or prevented. In its last analysis, the contention of the appellees, and of those decisions which support their contention, is that the failure of the debtor to promptly apply to the court to be declared a voluntary bankrupt, and so effect an equal distribution of his property among his creditors, is conclusive evidence of his having "suffered or permitted" the obtaining of a preference referred to in the act, no matter how impossible legal resistance on his part to such preference may have been, and no matter how incapable he may have been to "vacate or discharge" the preference so obtained, otherwise than by his voluntary bankruptcy. This seems to us an unwarranted, as well as a harsh, interpretation of the section under consideration, justified neither by the language employed nor the scope or intent of the act itself, as gathered from its consideration as a whole. It is a begging of the question of bankruptcy, inasmuch as it requires that a preference once obtained by a creditor, even *in invitum* as to the debtor, should fix the status of such debtor as a bankrupt, either by the involuntary or by a so-called voluntary proceeding. We do not think it could have been meant in this act, any more than in the act of 1867, to put a compulsion upon the debtor to apply to be declared a bankrupt. The language of the Supreme Court in *Wilson v. Bank*, 17 Wall. 473, 21 L. Ed. 723, as to this proposition, is as applicable to the present act as it was to the bankrupt act of 1867. It is true that in the act of 1898 and in the clause under consideration it was expressly provided that even though a preference has been "suffered or permitted," it shall not be an act of bankruptcy, if the debtor vacates or discharges the same within a certain time, and that there is no express provision of this kind in the act of 1867. But neither in the existing act nor in the act of 1867 is there any express provision making it the legal duty of the insolvent, when sued by one creditor in a proceeding likely to end in a judgment and seizure of property, to file himself a petition in bankruptcy; nor is this duty to be inferred from the scope of the act or the spirit of the law, nor is it essential to its successful operation in the one case more than in the other. Mr. Justice Miller, in the case of *Wilson v. Bank*, above referred to, in delivering the opinion of the court, says upon this point: —

"We have already said that there is no moral obligation on the part of the insolvent to do this, unless the statute requires it, and then only because it is a duty imposed by the law. It is equally clear that there is no such duty imposed by that act in express terms. . . . As before remarked, the voluntary clause is wholly voluntary. No intimation is

given that the bankrupt must file a petition under any circumstances. While his right to do so is without any other limit than his own sworn averment that he is unable to pay all his debts, there is not a word from which we can infer any legal obligation on him to do so. Such an obligation would take from the right the character of a privilege, and confer on it that of a burdensome and often ruinous duty. It is, in its essence, involuntary bankruptcy. But the initiation in this kind of bankruptcy is by the statute given to the creditor, and is not imposed on the debtor. And it is only given to the creditor in a limited class of cases."

Though the act of 1867, in its corresponding provision, which is section 39 of the act, speaks of the "procuring or suffering" by the debtor of his property to be taken on legal process, with intent to give a preference, etc., we do not think the reasoning of the Supreme Court above quoted, in regard to the alleged duty or necessity for the debtor to take proceedings to be declared a voluntary bankrupt, can be claimed to be at all affected by this difference between the two acts, but is, as we have said, as applicable under the one as the other.

We conclude, then, both upon reason and authority, that there is no duty imposed upon the debtor to file a voluntary petition in bankruptcy for the purpose of discharging a preference, however obtained, where no other way of doing so is open to him, and that his mere failure to file such a petition will not warrant an inference either that he is hopelessly insolvent, or that he consents to the preference which his creditor has obtained. There is no such contradiction of terms involved in the practical administration of the bankrupt act. The failure to vacate or discharge, as mentioned in the act, means, evidently, a failure to do something which would relieve the debtor from the consequence of his act, in having "suffered or permitted," etc., and not a failure to do something which would only anticipate those consequences. The section in the act of 1867 defining acts of bankruptcy, and corresponding to section 3 of the present act, is section 39, and the provision analogous to clause 3 of section 3 reads as follows:—

"Sec. 39. That any person residing and owing debts, as aforesaid, who, after the passage of this act shall . . . procure or suffer his property to be taken on legal process, with intent to give a preference to one or more of his creditors, . . . shall be adjudged a bankrupt on the petition of one or more of his creditors . . . provided such petition is brought within six months after the act of bankruptcy shall have been committed."

Without laying too much stress on the distinction, it is to be observed that the action of the debtor, as described in this section, is the procuring or suffering his property to be taken on legal process. This denotes in itself a complete act of the debtor, and it was necessary to limit its universality by attaching to it the specific intent to give a preference, etc., as clearly there may have been on the part of the debtor a procuring or suffering of legal proceedings that had no reference to

or bearing upon the preference of a creditor. In clause 3 of the present act, however, as already quoted, the act of "suffering or permitting" goes at once to the preference of creditors, and there is no necessity of such a limitation of the act as is contained in the bankrupt law of 1867. To suffer or permit a preference implies an intentional act on the part of the debtor. The coupling of the specific intent as to a preference to the act of procuring or suffering a judgment, etc., in the act of 1867, does not make such an intent more necessary than do the words "suffer or permit a preference" in the present act. While the act of 1867 requires a specific intent on the part of the debtor to give a preference, in order that an act of bankruptcy may be established, the act of 1898 no less involves an intent on his part that a preference should be obtained. Any voluntary procurance or connivance, as connoted by the words "suffer or permit," on the part of the debtor in the obtaining by a creditor of a preference, is the equivalent of an obtaining of a lien with intent on the part of the debtor to give a preference. In each case the intent must exist, even though, as already stated, slight evidence may suffice in the former case. In other words, the provisions of the two acts, though differently framed, are in this regard substantially the same. To hold otherwise would be as absurd as to claim that there was a substantial difference, in the matter of intent, between saying, for instance, that an offence shall consist in a man's raising his hand within striking distance, with the intent to commit an assault upon another, and saying that it shall consist in committing an assault by so raising his hand. In delivering the opinion of the Supreme Court in the case of *Wilson v. Bank*, referred to in another connection, Mr. Justice Miller, of course, dwelt upon the express qualification of intent with which the act of procuring or suffering one's property to be taken on legal process, etc., was necessarily coupled. Bearing what has just been said in mind, the reasoning of that case will apply to the present one. It is true that the case before the Supreme Court did not involve the question whether the party was rightfully declared a bankrupt, but arose under the thirty-fifth section of the act of 1867, which declares void certain acts of the debtor, which were done "with a view to give a preference" to a creditor. The language of this section, so far as we are concerned with it now, is that if any person, being insolvent, etc., within four months of filing a petition by or against him, "with a view to give a preference to any creditor, . . . procures any part of his property to be attached, sequestered, or seized on execution, . . . the same shall be void." Here, as in the thirty-ninth section, above referred to, the act of "procuring" relates to the attaching of the debtor's property, and not directly to the obtaining or giving a preference. The act is qualified by the words "with a view to give a preference," etc. The qualification of the act by the specification of the intent is therefore necessary in both sections of the old act. In considering the question under the thirty-fifth section, Mr. Justice Miller construes it together with the thirty-ninth section, and uses this language:—

“The thirty-fifth section of the act, which is designed to prevent fraudulent preferences of a person in contemplation of insolvency or bankruptcy, declares that any attachment or seizure under execution of such person’s property, procured by him with a view to give such a preference, shall be void if the act be done within four months preceding the filing of the petition in bankruptcy by or against him. Though the main purpose of the thirty-ninth section is to define acts of the trader which make him a bankrupt, and that of the thirty-fifth is to prevent preferences by an insolvent debtor in view of bankruptcy, both of them have the common purpose of making such preferences void, and enabling the assignee of the bankrupt to recover the property; and both of them make this to depend on the intent with which the act was done by the bankrupt, and the knowledge of the bankrupt’s insolvent condition by the other party to the transaction. Both of them describe, substantially, the same acts of payment, transfer, or seizure of property so declared void. It is therefore very strongly to be inferred that the act of suffering the debtor’s property to be taken on legal process in section 39 is precisely the same as procuring it to be attached or seized on execution in section 35. Indeed, the words ‘procure’ and ‘suffer’ are both used in section 39.”

If the express specification of the intent to give a preference, with which the act of procuring or suffering property to be taken in execution is limited, is equivalent to the intention implied in the words “to suffer or permit a preference to be obtained,” as we think it is, then the reasoning of the Supreme Court in the case of *Wilson v. Bank* is applicable and authoritative in the present case, and the following language of Mr. Justice Miller must be considered:—

“The facts of the case before us do not show any positive or affirmative act of the debtors from which such intent may be inferred. Through the whole of the legal proceedings against them they remained perfectly passive. They owed a debt which they were unable to pay when it became due. The creditor sued them and recovered judgment, and levied execution on their property. They afforded him no facilities to do this, and they interposed no hindrance. It is not pretended that any positive evidence exists of a wish or design on their part to give this creditor a preference, or oppose or delay the operation of the bankrupt act. There is nothing morally wrong in their course in this matter. They were sued for a just debt. They had no defence to it, and they made none. To have made an effort by dilatory or false pleas to delay a judgment in the State court would have been a moral wrong, and a fraud upon the due administration of the law. There was no obligation on them to do this, either in law or in ethics. Any other creditor whose debt was due could have sued as well as this one, and any of them could have instituted compulsory bankrupt proceedings. The debtor neither hindered nor facilitated any one of them. How it is possible from this to infer, logically, an actual purpose to prefer one creditor to another, or to hinder or delay the operation of the bankrupt act?”

The following language in the same opinion is also pertinent:—

“The general legal proposition is true, that where a person does a positive act, the consequences of which he knows beforehand, then he must be held to intend those consequences. But it cannot be inferred that a man intends, in the sense of desiring, promoting, or procuring it, a result of other persons’ acts, when he contributes nothing to their success or completion, and is under no legal or moral obligation to hinder or prevent them. Argument confirmatory of these views may be seen in the fact that all the other acts or modes of preference of creditors found in both the selections we have mentioned, in direct context with the one under consideration, are of a positive and affirmative character, and are evidences of an active desire or wish to prefer one creditor to others. Why, then, should a passive indifference and inaction, where an action is required by positive law or good morals, be construed into such a preference as the law forbids? The construction thus contended for is, in our opinion, not justified by the words of either of the sections referred to, and can only be sustained by imputing to the general scope of the bankrupt act a harsh and illiberal purpose, at variance with its true spirit and with the policy which prompted its enactment.”

This case was followed in the Supreme Court by the case of *Clark v. Iselin*, 21 Wall. 360, 22 L. Ed. 568, in which the question arose under the 35th section of the act of 1867. It was a suit by an assignee in bankruptcy to recover certain assets which the bill charged were made over to the defendants in fraud of the bankrupt law. The court, by an opinion delivered by Mr. Justice Strong, confined itself to the construction of this thirty-fifth section, which, as we have seen above, provides for the making void of certain acts of the debtor done by him with the view to give a preference, etc., but, as we have seen in the prior case of *Wilson v. Bank*, the same construction is to be applied to both the thirty-fifth and the thirty-ninth sections of the act. Although the word “procure,” in this thirty-fifth section of the act of 1867, is somewhat stronger than the “permit or suffer,” in the third section of the present act, it is only a matter of degree, and does not at all affect the argument or conclusion arrived at. In considering the meaning and effect to be given to the language of this section, the Supreme Court say:—

“Now, in a case where a creditor, holding a confession of judgment perfectly lawful when it was given, causes the judgment to be entered of record, how can it be said the debtor procures the entry at the time it is made? It is true, the judgment is entered in virtue of his authority,—an authority given when the confession was signed. That may have been years before, or, if not, it may have been when the debtor was perfectly solvent. But no consent is given when the entry is made, where the confession becomes an actual judgment, and when the preference, if it be a preference, is obtained. The debtor has nothing to do with the entry. As to that he is entirely passive. Ordinarily he knows nothing of it, and he could not prevent it if he would. It is

impossible, therefore, to maintain that such a judgment is obtained by him when his confession is placed on record. Such an assertion, if made, must rest on a mere fiction. And so it has been decided by the Supreme Court of Pennsylvania."

That the court here was dealing alone with the meaning of the word "procure," or "procure or suffer," and not with the provision referring to a specific intent, is shown by the fact that the court introduced a discussion of this provision of the statute by immediately saying, after what has been quoted above:—

"More than this, as we have seen, in order to make a judgment and execution against an insolvent debtor a preference fraudulent under the law, the debtor must have procured them with a view or intent to give a preference."

The construction in this regard of the act of 1867 previously given by the district courts was entirely overthrown and reversed by the Supreme Court in this and other cases. Under the present act the decisions of the district courts have been in line with the holding of the court below in this case, upon the assumption that these decisions of the Supreme Court turned upon the proposition that intent was essential under the act of 1867, and upon the further assumption that intent was not essential under the act of 1898. To this, with the utmost respect for the courts so deciding, we cannot agree. If it had been the intention of Congress, in framing the present law, to make the mere obtaining by a creditor of a preference by judicial proceedings, apart from any exercise of the will or action of the debtor, work the bankruptcy of the latter, it could easily have been done by using fewer words than have been used. They would not have spoken of acts of bankruptcy by the debtor at all. They would have omitted the words "suffered or permitted," as denoting an action of the debtor, and have merely provided that any obtaining by a creditor of a preference by means of judicial proceedings against a debtor should result in his being declared a bankrupt. This was actually accomplished in the late English and Canadian acts, but it was accomplished by express and unequivocal language, which left nothing to construction. The English act of 1890, referred to, is in this regard as follows:—

"A debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods, under process, in any action in any court, or in any civil proceeding in the high court, and the goods have been either sold or held by the sheriff for twenty-one days."

To hold that the present act has done this, even to give effect to a supposed general policy of the law, in face of the clear and easily understood meaning of the language employed, would be, in our opinion, nothing short of judicial legislation. The construction of clause 3 of section 3 contended for by the appellees is so harsh in its consequences that we are unable to believe that it represents the will of Congress. Under that construction a person while solvent may give a judgment bond for full and *bona fide* consideration, and years there-

after, becoming insolvent and being temporarily abroad, judgment may be entered against him, and his property levied on, without the slightest knowledge or suspicion on his part; yet, because he fails to have the lien of the execution vacated or discharged at least five days before a sale or final disposition of the property levied on, he can be forced into involuntary bankruptcy. In such case the bankrupt act would either require the debtor to perform an impossibility to avoid bankruptcy, or cause him to be adjudged a bankrupt practically and substantially on the ground of his insolvency alone, which is only one of the several elements or conditions required by the bankrupt act to co-exist before he can legally be adjudicated a bankrupt.

Aside from the reasons heretofore given in support of the conclusion we have reached, the act discloses on its face certain expressions strongly suggestive of the will of the debtor as involved in the suffering or permitting a creditor to obtain a preference. We find language which must be deemed to have been used on the assumption that the act of bankruptcy cannot wholly consist of the act of the creditor, but must include an act, whether by way of positive procurement or of connivance, on the part of the debtor, which will justify an adjudication of his having committed an act of bankruptcy. Thus, in section 19 it is provided that "a person against whom an involuntary petition has been filed, shall be entitled to have a trial by jury, with respect to the question of his insolvency, . . . and any act of bankruptcy alleged in such petition to have been committed," etc. This provision seems to require the commission of an act by the alleged bankrupt, and not merely passivity or inaction on his part. So in section 60, cl. "a," it is provided that "a person shall be deemed to have given a preference if being insolvent, he has procured or suffered a judgment to be entered against himself," etc. Thus, while this section deals with the treatment of preferences, it may fairly be inferred that the procuring or suffering by a debtor of a judgment to be entered, when the effect of its enforcement will be "to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class," was treated by Congress as giving a preference, which involves a voluntary act on the part of the debtor, Section 67, cl. "f," is as follows:—

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same," etc.

This clause provides for making invalid liens obtained through legal proceedings against an insolvent person, within four months of the filing of the petition, on which the debtor is adjudged a bankrupt. It does not relate to acts of bankruptcy, but is predicated upon the facts that

an adjudication of bankruptcy has intervened, and the status of the bankrupt and of his estate have become established. It by no means follows that the obtaining of any of the liens referred to in clause "f," involves an act of bankruptcy. A lien obtained through legal proceedings, denounced by clause "f," may not have been "suffered or permitted," within the meaning of section 3. If Congress intended by the words "suffered" and "permitted," or either of them, mere passivity or inaction, it is somewhat remarkable that they were employed instead of the simpler phrase "obtained through legal proceedings," as used in section 67, cl. "f." The distinction in meaning between the words "suffered and permitted," as used in section 3, and the word "obtained," as used in section 67, cl. "f," is not only evident, but has been clearly recognized judicially. In *Re Richards*, 96 Fed. 935, 37 C. C. A. 633, decided by the Circuit Court of Appeals for the Seventh Circuit, it appeared that a judgment note was given by a debtor ten months before he became a voluntary bankrupt, and that judgment on the note was entered within four months of the filing of the petition in bankruptcy, and a levy made upon the property of the debtor. The case related to the validity of the preference thus obtained in violation of section 67, cl. "f." In the course of a carefully prepared opinion the court recognized the distinction above referred to, saying while treating of the relation of clause "c" to clause "f" of section 67:—

"But subdivision 'f' is broader in its scope, and avoids all liens obtained through legal proceedings within the time stated against a person who is insolvent within the meaning of the subdivision, irrespective of knowledge on the part of the creditor of the fact of insolvency, and irrespective of the question whether the obtaining of the lien was in any way suffered and permitted by the debtor. . . . We are of opinion, therefore, under the rule stated, corroborated and justified by the action of Congress, that the provisions of subdivision 'f' must prevail over those of subdivision 'c,' and that all liens obtained through legal proceedings within the time stated against a person who is insolvent, and irrespective of any sufferance or permission thereof by the debtor and of any knowledge by the creditor of the debtor's insolvency, are avoided if that subdivision can be held to apply to voluntary proceedings in bankruptcy, and if another objection hereinafter considered is unavailing. . . . The validity of the lien depends upon the terms of the act speaking to that subject, but not upon the question whether the acts which resulted in the lien were acts which subjected the debtor to proceedings in bankruptcy. It is doubtless true that the debtor could not have been forced into bankruptcy because of the acts done by him; but, under the law, when for any reason bankruptcy has supervened, and adjudication has been determined by the court, all liens which fall under the ban of section 67 are avoided, whether the debtor has been or could have been adjudicated a bankrupt for his acts with reference to any specific lien."

We have quoted at length from the foregoing opinion for the reason that the court has clearly emphasized and set forth the contrast between the provision made in section 67, cl. "f," of the act, making void certain liens obtained by a creditor, and the provision in regard to what acts of a debtor shall be followed by the consequences of bankruptcy. When it was desired to render liens obtained by a creditor under judicial proceedings against the property of his debtor void, under certain circumstances, without reference to any voluntary act of the debtor, Congress had no difficulty in finding appropriate language to express its meaning, just as the English act above quoted used appropriate and unequivocal language to define the things which, being done by the creditor, should work the bankruptcy of the debtor, without requiring any act on his part.¹

DALLAS, Circuit Judge. I concur in the conclusion arrived at in this case, but not in the construction put by the majority of the court upon clause 3 of section 3 of the bankruptcy act of 1898. The reasons for this dissent may be briefly stated, and need not be elaborated. I do not think that any special significance should be ascribed to the word "acts," as it occurs in section 3. What was intended, as I believe, was merely to designate what conduct of a person would have the effect of making him a bankrupt. The word "acts" is certainly sometimes used as an equivalent for the word "behaves," even where the behavior referred to is not positive, but negative, in character, as where it is said that a man acts unreasonably in not doing something which in reason he ought to do. In the corresponding section of the bankrupt act of 1867 it was unquestionably so used, and I perceive no ground for supposing that in the act of 1898 it was employed in a narrower sense. By section 39 of the act of 1867 it was provided, among other things, that any person "who has been arrested and held in custody under or by virtue of mesne process, . . . and such process is remaining in force and not discharged by payment, . . . or has been actually imprisoned, . . . shall be deemed to have committed an act of bankruptcy." Here, then, we find that under the act of 1867 an act of bankruptcy might consist of the debtor's arrest or imprisonment, which, of course, could not be his own act, and that, by his not doing, — not paying, — the act of bankruptcy constituted by his arrest would be consummated and established. Hence it appears that Congress in the previous statute provided that certain acts, not of the debtor himself, should be deemed to be acts of bankruptcy committed by him; and I therefore cannot agree that, by reason of the association in the present act of the same phrase — "acts of bankruptcy" — with the words "suffered or permitted," these words must be interpreted to mean connivance, co-operation, or participation, and nothing else besides. Neither can I agree that the words "suffered or permitted" necessarily import positive action. They may do so, it is true; but they also, and

¹ Portions of this opinion immaterial to the main point have been omitted.

I think ordinarily (especially when disjunctively presented), signify passive sufferance or quiescent allowance, — “not to forbid or hinder; to tolerate” (Webster); “to refrain from hindering; allow, permit; tolerate” (Century). But there are considerations which, in my opinion, should have greater weight in the construction of this clause than any nice discrimination of the diverse definitions of particular words. The cases of *Wilson v. Bank* and *Clark v. Iselin* were decided under the act of 1867, and, with those decisions and that act presumably in mind, the act of 1898 was passed, with provisions which, as respects the matter in question, notably differ from those of the act of 1867. The word “procure,” which was in that act, and which might well be said to indicate that positive action on the part of the debtor was contemplated, was pointedly omitted from the act of 1898; and to the word “suffered” there was added the words “or permitted,” with, as I think, the evident intention of making it clear that procurement would not be necessary, but that mere sufferance or allowance would be enough, to occasion bankruptcy. Moreover, clause 3 of section 3 of the act of 1898 does not include the provisions of the act of 1867 with reference to the debtor’s intent, or anything whatever upon that subject; and this departure, I think, shows that the object in view was not merely to impose bankruptcy upon the debtor because he had given a preference, but was to preclude, where possible, the acquisition of any advantage of one creditor over others. Taken together, I cannot but regard these modifications as significant of a design to prevent the present statute from being construed as the former one had been. It cannot be supposed that such suggestive changes in their otherwise similar terms were made without purpose, and to me it is manifest that the intention in making them was to establish as the law of 1898 — no matter what that of 1867 might have been — that, if an insolvent (regardless of intent or procurement) either suffered or permitted any creditor to obtain a preference, his failure to vacate it within the time limited would be an act of bankruptcy; and this understanding is accordant with the general policy of the act, to which allusion has been made, that no creditor shall be, either by procurement or sufferance, enabled “to obtain a greater percentage of his debt than any other of such creditors of the same class.” Section 60. The decisions of the district courts in other circuits as well as in this one are in harmony with the views I have expressed. Those decisions¹ are, of course, not binding upon us, but they are entitled to much weight; and, in my opinion, the construction which has heretofore uniformly been given to the clause under consideration ought not now to be discarded in this jurisdiction.

¹ *Re Meyers*, 1 A. B. R. 1 (referee); *Re Whalen*, 1 N. B. N. 228; *Re Reichman*, 91 Fed. Rep. 624; *Re Moyer*, 93 Fed. Rep. 188; *Re Ferguson*, 95 Fed. Rep. 429; *Re Roms Planing Mill*, 96 Fed. Rep. 812; *Parmenter Mfg. Co. v. Stoeber*, 97 Fed. Rep. 330 (C. C. A. 1st. Circ.); *Re Thomas*, 103 Fed. Rep. 272; *Re Storm*, 103 Fed. Rep. 618; *Re Harper*, 105 Fed. Rep. 900.

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SECTION II. (*continued*).

(e) TRANSFERS FOR PRESENT CONSIDERATION.

RE LOCKE.

DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS,
DECEMBER, 1868.

[*Reported in 1 Lowell, 293.*]

OBJECTIONS to the bankrupt's discharge heard by the court. The examination of the bankrupt, which was the only evidence in the case, tended to show that he had been extensively engaged in trade down to the year 1857, when he failed and settled with many of his creditors. Others, including the two who proved their debts here and opposed his discharge, had obtained judgments which were still valid. Since 1857 Locke had not been a trader, but had earned money by service in the army and as a clerk. The specifications set up certain payments made by him from time to time, within four months before filing his petition, for rent and other necessities. Locke admitted that he was insolvent when he made those payments and for ten years before, but denied any intent to prefer those creditors and any contemplation of bankruptcy.

J. D. Ball, for the creditors.

J. S. Abbott, for the bankrupt.

LOWELL, J. . . . I am further of opinion that the payments which this debtor made are not within any true definition of a fraudulent preference. It is very rarely that the payment of rent, or of a butcher's or grocer's bill, in the ordinary course of dealing, can be a preference, because the consideration is a continuing one. If the tenant does not pay his rent, he is ejected, and the main consideration is the forbearance; and so of the other like bills, though in a less degree. We have seen that a debtor cannot be said to intend a preference, unless he expects or fears either to stop payment or to become bankrupt. The evidence shows that this defendant did not contemplate bankruptcy. He had, indeed, years before stopped payment, and ceased to be a trader, and had disposed of his trade capital by what may or may not have been preferences by the law of his domicile. But he had accumulated no new estate, and the payments which are now objected to were for his current expenses, and made out of his current earnings, though they were made monthly and not day by day. If these were technical preferences under section 39, which I doubt in the case of one not a trader, and not paying one trade creditor before another, yet I cannot believe they were fraudulent preferences within section 29, which should bar his discharge. *Discharge granted.*¹

¹ In *Smith v. Teutonia Ins. Co.*, 22 Fed. Cas. No. 13,115, it was held that payment of rent by a company after its insolvency was known was not an act of bankruptcy as it

EX PARTE AMES. RE MCKAY AND ALDUS.

DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, APRIL, 1871.

[Reported in 1 Lowell, 561.]

LOWELL, J. The petitioner, as trustee for himself and his partner, holds a mortgage upon nearly all the stock, tools, and other movable property of the bankrupts, and it was to be expected that the general creditors should look upon the transaction with suspicion, and inquire carefully into its consideration. The advances were all made after the nineteenth of September; the mortgage was made on the seventeenth of October, and McKay and Aldus stopped payment on the latter part of November of the same year, 1868. A mortgage of all the property of a trader, or of so much as will make him insolvent, when given for a pre-existing debt, is, by the law of England, conclusively presumed to be a fraud upon the bankrupt act: Worsley v. DeMattos, 1 Burr. 467; Dutton v. Morrison, 17 Ves. 199; Lindon v. Sharp, 6 M. & G. 895; Stewart v. Moody, 1 C. M. & R. 777; and although our law does not deal in conclusive presumptions, yet the result is much the same, for it would be almost impossible to explain away such an apparent preference. It is not so with security given for present or future advances, which if made in good faith and without notice of any fraudulent intent on the part of the trader, cannot be acts of bankruptcy, for the reason that a fair exchange of equivalents injures no one. Unless, therefore, the mortgagee is party or privy to some fraud or preference (as in the case of *Ex parte Mendell, Re Butler, supra*, 506), he may hold his security against the assignee however insolvent the mortgagor may have been at the time. Hutton v. Cruttwell, 1 Ellis & B. 15; Bittlestone v. Cooke, 6 Ellis & B. 296; Harris v. Rickett, 4 H. & N. 1.¹

prevented the "forfeiture of the lease and the consequent loss of their office furniture and other property." *Reed v. Phinney*, 2 N. B. N. 1007 (referee), *acc.* See also *Re Pearson*, 95 Fed. Rep. 425. In *Re Merchant's Ins. Co.* 6 B. R. 43, 48, however, the court held that payment of the rent of a lot on which the lessee had erected a valuable building, though made with a view of "sub-serving the best interests of creditors," was "a technical act of bankruptcy." In *Re Lange*, 97 Fed. Rep. 197, Brown, D. J., said: "Payment of rent by an insolvent is not necessarily an act of bankruptcy. But when it is done as a means and for the purpose of carrying on a business in fraud of creditors, it should be so regarded."

In *Smith v. Teutonia Ins. Co., supra*, it was also held that payment of salaries in the course of business was not an act of bankruptcy, but in *Re Kenyon*, 6 B. R. 238, it was held that payment even of wages entitled to priority under the bankrupt act was an act of bankruptcy. The surrender of such payments by creditors as a condition of proof was compelled in *Re Kohn*, 2 N. B. N. 367 (referee); *Re Jones*, 2 N. B. N. 961.

¹ *Tiffany v. Boatman's Inst.*, 18 Wall. 375; *Ex parte Packard*, 1 Low. 523; *Darby v. Institution*, 1 Dill. 144; *Gaffney v. Signaigo*, 1 Dill. 158; *Re York*, 3 B. R. 661; *Harrison v. McLaren*, 10 B. R. 244; *Re Montgomery*, 12 B. R. 321; *Douglass v. Vogeler*, 6 Fed. Rep. 53; *Re Cobb*, 96 Fed. Rep. 821; *Re Wolf*, 98 Fed. Rep. 84; *Williams v. Coggeshall*, 11 Cush. 442; *Bush v. Boutelle*, 156 Mass. 167; *Leighton v. Morrill*, 159 Mass. 271, *acc.* But a transfer of an insolvent's whole property to secure

In cases of a mixed character, where security for a past debt is coupled with a further advance, the law of England is thus stated by the latest text writer: "It does not appear to be formally settled whether the assignment by a debtor of the whole of his effects, in consideration partly of an existing debt and partly of an advance, is or is not an act of bankruptcy." After citing the authorities on both sides, he adds: "The weight of authority would seem to be in favor of a transaction of this sort not being an act of bankruptcy where the advance is made bona fide to enable the debtor to meet his engagements and carry on his business. Such an act may be, and in fact often is, the wisest course a trader can take to promote the interest of his creditors." Robson on Bankruptcy, 110, citing *Re Colemere*, L. R. 1 Ch. Ap. 128; *Allen v. Bonnett*, 21 L. J. N. S. 309.¹

I am inclined to think that the test proposed by Mr. Robson is the true one under our law. It is not every insolvent who can be made bankrupt by his creditors, though every insolvent can petition in his own behalf. Congress has carefully refrained from saying that a state of insolvency is equivalent to an act of bankruptcy, though hopeless insolvency as proved by certain tests is so. For instance, a trader whose paper lies over for fourteen days has become bankrupt; but if his credit is sufficient to enable him to obtain a renewal within thirteen days, he cannot be proceeded against as a bankrupt on that ground. The question being in each case whether there was an intent to prefer, there may be many in which the evidence of a real and honest intention not to stop payment may make valid a security which was partly given for money previously advanced, if coupled with sufficient present advantages to the debtor to relieve the case of any fraudulent appearance. And there may even be cases where the purpose and expectation to keep on are so manifest that no intent to prefer can be found, though the insolvency was well known to both parties.

The present case, however, is not one which calls for any critical examination into the boundary lines of the domain of preference. The history of the dealings between these parties from the 19th of September onward fails to show any intended fraud on the act. Indeed I

a small temporary loan at an exorbitant rate of interest was held invalid in *Brooks v. Davis*, 4 Fed. Cas. No. 1950.

Similarly a sale for value may be made by an insolvent. *Sedgwick v. Lynch*, 5 Ben. 489; *Re Pusey*, 7 B. R. 45; *Sedgwick v. Wormser*, 7 B. R. 186; *Tiffany v. Lucas*, 8 B. R. 49; *Re Strenz*, 8 Fed. Rep. 311; *North v. McDonald*, 1 Wyo. 348, 351. In *Re Strenz*, the sale was of the insolvent's entire stock of goods and fixtures.

¹ In the seventh edition of Robson on Bankruptcy, 155 (1894), the passage reads: "It may, however, be now considered as settled that a transaction of this sort is not an act of bankruptcy, where the advance is of a substantial sum and made *bona fide* to enable the debtor to meet his engagements, and, if a trader, to carry on his business. . . . If, however, the circumstances of the case are such as to show that the real object in making the advance was not to enable the debtor to continue his trade or meet his engagements, but to secure to the creditor the repayment of the debt previously owing to him, the transaction will be regarded as a fraud on the other creditors and an act of bankruptcy."

understand it to be admitted that there was no such intent at first; but the assignees think they can discover a point where good faith ends and preference begins. They argue that the lenders advanced more money than they had intended or more than they had security for, and when they found this out determined to take the mortgage at any rate, to cover their advances and secure themselves if possible. The evidence lends no aid to this theory, but sets out a continuing course of dealing in which loans and security were contemporaneous throughout. I find it to be fully established that the firm of McKay & Aldus hoped and intended to continue their business, and made the mortgage with that view, and that their representations to the petitioner were calculated to make him believe not only that such was their hope, but that it was one that might be reasonably entertained. A mortgage made under such circumstances and for such a purpose cannot be successfully assailed if it is given for present and future advances only. It is argued, however, very strongly that this mortgage was intended mainly for past loans. No doubt it reads so on its face; but the proof is that many of the acceptances recited on it, although some of them are dated back a few days, so that it should not fall due at once, were given on the credit of this mortgage, and were not in fact delivered until the security itself was delivered. Our law of preference sets aside all payments and conveyances made with intent to prefer one creditor over the rest, whatever motives may have been brought to bear on the debtor by threat, entreaty, or legal coercion. And with us it is perhaps not the law, as it is in England, that a general promise of security given at the time the debt is contracted, may be executed after the debtor has become insolvent. Such a promise will not save the act from being a preference, if it would have been one without the promise. This, I have more than once ruled to the jury, and there are reported cases for it. *Arnold v. Maynard*, 2 Story, 349; *Graham v. Stark*, 3 B. R. 92; *Blodgett v. Hildreth*, 11 Cush. 311. I have been accustomed to say that such an agreement merely amounts to an agreement to give a preference if one should become necessary.¹ But I have always ruled that security fairly given, as part of the same transaction as the loan, could not be invalidated by a change of the borrower's situation *re infecta*, as if the money were advanced while the mortgage was in course of preparation, and the debtor fails in the mean time.² I have not seen or known of any

¹ *Bank of Leavenworth, v. Hunt*, 11 Wall. 391; *Rundle v. Murgatroyd*, 4 Dall. 304; *Re Connor*, 1 Low. 532; *Brett v. Carter*, 2 Low. 458; *Barrow v. Morris*, 14 B. R. 371; *Burdick v. Jackson*, 15 B. R. 318; *Lloyd v. Strobbridge*, 16 B. R. 197; *Holmes v. Winchester*, 135 Mass. 299., *acc.*

M'Mechen's Lessee v. Grundy, 3 H. & J. 185, *contra*.

² *Re Perrin*, 7 B. R. 283; *Re Montgomery*, 17 Fed. Cas. No. 9,732; *Gattman v. Honea*, 12 B. R. 493; *Sparhawk v. Richards*, 12 B. R. 74; *Croswell v. Allis*, 25 Conn. 301; *Nicholson v. Schmucker*, 81 Md. 459; *Bush v. Boutelle*, 156 Mass. 167, and earlier Massachusetts decisions cited, *acc.* See also *Post v. Corbin*, 5 B. R. 11; *Williams v. Clark*, 47 Minn. 53; *Cartwright v. Wilmerding*, 24 N. Y. 521. *Conf. Re Sheridan*, and note thereto, *infra*, p. 337.

case which brings up the somewhat nicer question, argued here, whether specific and definite security, unconditionally stipulated for in writing, may be given after a lapse of time and a change of circumstances. This may depend on whether the contract is one that a court of law or equity would enforce *in invitum*; for I apprehend and have often decided. subject to a correction that has not yet been made, that the assignee stands no better than the bankrupt in all matters of title, excepting where there is actual or constructive fraud. The petitioner insists that the letter of McKay & Aldus to him, of 21 September, if acted on and if the money was advanced on the faith of it, would give him an equitable lien which would prevail against the assignee. I shall not examine the point of law, because the facts negative any illegal intent, so that I must uphold the mortgage whether it was a mere continuation of the written promise or was a new contract. The petitioner advanced money from time to time and took security for each advance, and when the mortgage was ordered and was being drawn up, he had what appeared to be ample security for his then existing advances. It has turned out that one piece of property which he then held is of much less value than was supposed, and one other of somewhat less value, but there was no reason to suspect this at the time, and the difference even now is but trifling compared with the whole amount at issue, and I cannot find as a fact that this mortgage was given with any intent to prefer, or with any fear that the existing advances were not amply secured. The conduct of both parties before and after and at the time show as clearly as does all the rest of the evidence that the mortgage was intended for a legitimate business transaction, having relation to the continuance and not the stopping of the trade, and that the advances made at and after the time were the sole moving consideration for the mortgage. Under these circumstances I do not feel justified in avoiding the mortgage even to the extent of the few thousand dollars that are said not to have been already fully secured of the advances made in September. I do not undertake to recapitulate evidence, but I may say here that considering the dates, I doubt whether there is even a small balance of the earlier advances left to be paid out of the property embraced in the mortgage; because I think it will be found that acceptances for at least four or five thousand dollars were advanced while the mortgage was in preparation, and these would be protected by it if such was the agreement of the parties when they were given.¹

¹ A portion of the opinion dealing with what the mortgage covered is omitted.

IN RE WOLF.

DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, DECEMBER 11, 1899.

[Reported in 98 Federal Reporter, 84.]

SHIRAS, District Judge. From the facts certified to the court, it appears that the bankrupt, Wolf, being indebted to Julius Arkin, on the 15th day of May, 1899, executed and delivered to him, as evidence of his indebtedness, a promissory note for \$200, payable in 90 days from date. On the 22d day of July, 1899, the bankrupt borrowed of Arkin the sum of \$100, giving his note therefor, payable in 30 days from date; and to secure this indebtedness, as well as that evidenced by the note dated May 15, 1899, the bankrupt executed and delivered to Arkin a chattel mortgage on his stock of goods in Lisbon, Iowa, — it appearing that Arkin would not advance the loan of \$100 unless the bankrupt would give security to cover, also, the pre-existing indebtedness. Shortly after the execution and recording of this mortgage, Wolf, the mortgagor, was adjudged to be bankrupt, and his stock in trade was taken possession of and was sold by the trustee; and the mortgagee filed his intervening petition before the referee, praying that he be held to have a valid lien on the stock of goods as security for the indebtedness due him. Upon the hearing before the referee, it was held that the mortgage security was void as to creditors, in that it was a preference, and taken under circumstances rendering it invalid as against the creditors represented by the trustee.

Viewed as a security given to secure the payment of the pre-existing indebtedness evidenced by the note dated May 15th, the holding of the referee that the mortgage was invalid, because thereby a preference was intended to be created in favor of the creditor, is sustained.¹ Viewed, however, as a security for the sum of \$100, money advanced to the bankrupt at the time of the execution of the mortgage, there is nothing shown in the evidence which required the holding that the security given for this loan is not valid. As the security was given for a debt then created, it was a present security, and not a preference which was created by the mortgage; and the case comes within the rule announced by Judge Dillon in *Darby v. Institution*, 1 Dill. 144, Fed. Cas. No. 3,571, wherein it is said that: —

“An insolvent person may properly make efforts to extricate himself from his embarrassments, and therefore he may borrow money, and give at the time security therefor, provided, always, the transaction be free from fraud in fact, and upon the bankrupt act. And hence it is a settled principle of bankrupt law, both in England and in this country, that advances made in good faith to a debtor to carry on business, upon

¹ *Johnson v. Wald*, 93 Fed. Rep. 640 (C. C. A.), acc.

security taken at the time, do not violate either the terms or policy of the bankrupt act."

When the mortgage security was taken in this instance, it was shown on the face of the instrument that it was given in part to secure a pre-existing debt, and in part to secure a note of even date. The mortgage was duly recorded, and no other creditor could be misled by the provisions thereof. As between the bankrupt and the creditor, the mortgage was valid, was not tainted with fraud in fact, and the only objection to be urged against the same is that if the trustee should pay the note for \$200, dated May 15th, it would be giving a preference to the mortgagee over the other creditors, as that was a debt created before the giving of the mortgage, whereas the bankrupt had full right to give security for the present loan of \$100. In other words, if the bankrupt had given on the 22d of July a chattel mortgage on his stock to secure the pre-existing debt, evidenced by the note dated May 15th, and on the same day had given a second mortgage to secure the loan of \$100 then advanced as a present consideration, the first mortgage might be nonenforceable against other creditors, under the provisions of the bankrupt act, but the second mortgage would be valid, being given for a present consideration advanced in good faith upon the faith of the security created by the second mortgage. In equity the rights of the parties are not affected by the fact that both the past and present debt are secured by one mortgage instead of two. As already said, there was no effort to mislead creditors by uniting the past debt with the present loan in one note, thus apparently making the past debt a present one, but the actual situation was made plain on the face of the mortgage. There being no actual fraud in the transaction, no provision of the bankrupt act is violated by holding that Arkin is entitled to the benefit of his security so far as the note for \$100 is involved, and it is so ordered.¹

¹ In *Denny v. Dana*, 2 Cush. 160, it was held, *SHAW, C. J.*, delivering the opinion, that a mortgage which was in part a voluntary preference was wholly void, and this case has been followed in *Tuttle v. Truax*, 1 B. R. 601; *Re Jordan*, 5 B. R. 416; *Grannis v. Beardsley*, 10 Fed. Cas. No. 5,688; *Paine v. Waite*, 11 Gray, 190; *Forbes v. Howe*, 102 Mass. 427. See also *Goodrich v. Wilson*, 119 Mass. 429. But other cases hold that the security is valid as to the present advance. *Whiston v. Smith*, 2 Low. 101; *Corbett v. Woodward*, 5 Sawy. 403; *Re Stowe*, 6 B. R. 429; *Cramton v. Tarbell*, 6 Fed. Cas. No. 3,349; *Re Cobb*, 96 Fed. Rep. 821. See also *Bucknam v. Goss*, 1 Hask. 630.

SAWYER v. TURPIN.

SUPREME COURT OF THE UNITED STATES, OCTOBER, 1875.

[Reported in 91 United States, 114.]

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

On the fifteenth day of May, 1869, J. C. Bacheller, in order to secure a debt due by him to Novelli & Co., executed a bill of sale conveying his chattel interest in certain property to Turpin, one of the defendants below.

This conveyance was not recorded, nor was possession had thereunder.

On the 31st of July, 1869, Turpin having surrendered the bill of sale, Bacheller, in exchange therefor, executed to him a mortgage upon the same property. This mortgage was recorded on the 17th of the following September.

Bacheller filed his petition in bankruptcy the twenty-second day of October then next ensuing; and the appellants, his assignees, filed their bill in the District Court to set aside the mortgage as a fraudulent preference of a creditor, alleging that Bacheller was insolvent when the mortgage was given, and that Turpin, and Novelli & Co., the other defendants, knew of the fact.

The District Court passed a decree dismissing the bill, which was affirmed by the Circuit Court. The assignees appealed to this court.

The recording statutes of Massachusetts which apply to the case are set forth in the opinion of the court.

Mr. Benjamin Dean and Mr. J. G. Abbott, for the appellants.

Mr. Joshua D. Ball, for the appellees.

Mr. Justice STRONG delivered the opinion of the court.

The only question presented by this appeal is, whether the mortgage given by the bankrupt on the thirty-first day of July, 1869, to Edward Turpin, the agent of Novelli & Co., was a fraudulent preference of creditors within the prohibition of the bankrupt act, and therefore void as against the assignees in bankruptcy. That it was a security given for the protection of a pre-existing debt, and that it was given within four months immediately preceding the filing of the petition in bankruptcy, are conceded facts. It may also be admitted that the bankrupt was insolvent when the mortgage was made, and that the creditors had then reason to believe he was insolvent.

The petition in bankruptcy was filed on the 22d of October, 1869. On the 15th of May next preceding that date, Bacheller, the bankrupt, who was indebted to Novelli & Co. in the large sum of \$27,839 in gold, conveyed to Turpin, who was their agent, as a security for the debt, the building described in the subsequent mortgage of July 31. It was

a frame building, erected upon leased ground; and Bacheller had, therefore, only a chattel interest in it. The conveyance was by a bill of sale absolute in its terms, having no condition or defeasance expressed; but it was understood by the parties to be a security for the debt due. It was in substantial legal effect, though not in form, a mortgage. Having been executed more than four months before the petition in bankruptcy was filed, there is nothing in the case to show that it was invalid. True, it was not recorded; and it may be doubted whether it was admissible to record. True, no possession was taken under it by the vendee; but for neither of these reasons was it the less operative between the parties. It might not have been a protection against attaching creditors, if there had been any; but there were none. It was in the power of Turpin to put it on record any day, if the recording acts apply to such an instrument; and equally within his power to take possession of the property at any time before other rights against it had accrued. These powers were conferred by the instrument itself, immediately on its execution. In regard to chattel mortgages, the recording statutes of Massachusetts, enacted in 1836, provide as follows: "No mortgage of personal property hereafter made shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to and retained by the mortgagee, or unless the mortgage be recorded by the clerk of the town where the mortgagor resides." Rev. Stat. 473, c. 74. The statute contains a clear recognition of the validity of an unrecorded chattel mortgage, as between the parties to it; though no possession be taken under it. And the General Statutes of the State, enacted in 1860 (Gen. Stat. 769, c. 151), contain the same recognition. Their language is the following: "Mortgages of personal property shall be recorded on the records of the town where the mortgagor resides when the mortgage is made, and on the records of the city or town in which he then principally transacts his business, or follows his trade or calling. If the mortgagor resides without the State, his mortgage of personal property within the State, when the mortgage is made, shall be recorded on the records of the city or town where the property then is. Unless a mortgage is so recorded, or the property mortgage is delivered to and retained by the mortgagee, it shall not be valid against any person, other than the parties thereto, except as provided in the following section."¹

¹ "An assignee in insolvency is not one of the parties within the meaning of the statute." *Blanchard v. Cooke*, 144 Mass. 207, 226. But if an unrecorded mortgage is not actually fraudulent, "if the plaintiff (mortgagor) rightfully took possession of the goods before they were attached, or before proceedings in insolvency were instituted, and retained this possession, we think his title to the extent of his interest is good against the assignee in insolvency. . . . But the plaintiff's possession must be rightful in order to enable him successfully to assert his title against the assignee. If he had no right to take possession when he took it, his possession cannot avail him. Our construction of the contract is, that the plaintiff had not the right to take possession unless there had been some breach of the contract by Cooke; but if there had been a substantial breach, that the plaintiff had this right while the default contin-

The exception extends only to mortgage contracts of bottomry, or *respondentia*, to transfers, assignments, or hypothecations of ships or vessels, and to transfers in mortgage of goods at sea or abroad. Neither of these acts prescribes when the record must be made, or the possession be taken; but, when made, the instrument takes effect, as against third persons as well as between the parties, from the time of its execution, unless intervening rights have been obtained. In *Mitchell et al. v. Black et al.*, 6 Gray, 100, it was ruled by the Supreme Court of Massachusetts that one who had taken bills of sale of merchandise from his debtor as a security for money advanced, and who had allowed the debtor to sell portions of the merchandise in the usual course of his business as if he were the owner thereof, might take possession of it any time in order to secure his debt; and that such taking of possession, though at a time when the debtor was known by himself and the creditor to be insolvent, was effectual, notwithstanding the State Insolvent Law, which contained provisions very like those of the bankrupt act. The court held unqualifiedly that the bills of sale, absolute as they were in terms, though in fact intended only as a security, and though unattended by possession of the property, and though not placed upon record, vested a complete title in the creditor, subject only to be defeated by the discharge of the debt, or by some intervening right acquired before the possession was taken. This was a case of bills of sale, like the present, not a case of a technical mortgage. In speaking of the registration of mortgages, the court said: "The time when the record shall be made is not specifically prescribed by the statute, though it must undoubtedly precede the possession by others subsequently acquiring an interest in the mortgaged property. To prevent it from passing to them, it will be sufficient that the record is made at any time before such possession is taken, though it be long after the execution of the mortgage."¹

It should not be doubted, then, that the bill of sale of May 15, 1869, conveyed to Turpin all Bachelier's interest in the frame building; that it was effective for the purposes for which it was made; and, no other rights having intervened, that it was a valid security, to the extent of the value of the property, for the debt due Novelli & Co. on the 31st of July, 1869, when the mortgage impeached by the bill was made.²

ued." Ibid. 227. See also *Bennett v. Bailey*, 150 Mass. 257; *Bliss v. Crosier*, 159 Mass. 498; *Harriman v. Woburn Electric Light Co.*, 163 Mass. 85; *Moors v. Reading*, 167 Mass. 322; *Drury v. Moors*, 171 Mass. 252.

¹ The time for recording is now limited in Massachusetts to fifteen days. Pub. Stats. c. 192, § 1.

² The Massachusetts court held otherwise in *Copeland v. Barnes*, 147 Mass. 388, which was similar in its facts to *Sawyer v. Turpin*, but where a contrary result was reached. On page 390, the opinion reads: —

"The delivery of the bill of sale did not constitute a mortgage, even though supposed by both parties to be such. A bill of sale made for security, even though running directly to the person to be secured, and though accompanied by delivery of the goods, is at most only a pledge, and not a mortgage. *Shaw v. Silloway*, 145 Mass. 503, 505; *Thompson v. Dolliver*, 132 Mass. 103. If no delivery of the goods is made,

T The mortgage covered the same property. It embraced nothing more. It withdrew nothing from the control of the bankrupt, or from the reach of the bankrupt's creditors, that had not been withdrawn by the bill of sale. Giving the mortgage in lieu of the bill of sale, as was done, was, therefore, a mere exchange in the form of the security. In no sense can it be regarded as a new preference. The preference, if any, was obtained on the 15th of May, when the bill of sale was given, more than four months before the petition in bankruptcy was filed. It is too well settled to require discussion, that an exchange of securities within the four months is not a fraudulent preference within the meaning of the bankrupt law, even when the creditor and the debtor know that the latter is insolvent, if the security given up is a valid one when the exchange is made, and if it be undoubtedly of equal value with the security substituted for it. This was early decided with reference to the Massachusetts insolvent laws (*Stevens v. Blanchard*, 3 Cush. 169); and the same thing has been determined with reference to the bankrupt act. *Cook v. Tullis*, 18 Wall. 340; *Clark v. Iselin*, 21 Wall. 360; *Watson v. Taylor*, id. 378; and *Burnhisel v. Firman*, 22 Wall. 170.¹ The reason is, that the exchange takes nothing away from the other creditors. It is, therefore, not in conflict with the thirty-fifth section of the act, the purpose of which is to secure a ratable distribution of the property of a bankrupt owned by him at the time of his becoming bankrupt, and undiminished by any fraudulent preferences given within four months prior thereto.

It follows that the mortgage of July 31 was not prohibited by the bankrupt act when it was given, and that it was valid. Hence, as it was recorded on the seventeenth day of September, 1869, pursuant to the requisitions of the State law, before any rights of the assignees in bankruptcy accrued, it cannot be impeached by them.

It has been argued, however, on behalf of the assignees, that the bill of sale of May 15 was an insufficient consideration for the mortgage, because, as alleged, there was an agreement between Bacheller and Turpin that it should not be recorded, and should be kept secret. If the fact were as alleged, it is not perceived that it would be of any importance; for it is undeniable that the bill of sale rested on a valu-

it can be no more than an agreement for a pledge or mortgage. Such agreement, made at the time when a debt is contracted, will not avail to protect the actual pledge or transfer of the property; when made, from the operation of the statute against preferences by an insolvent debtor. The statute makes no exception in favor of securities given in pursuance of a previous agreement, but declares all transfers and conveyances void, if made within six months, and under the circumstances therein stated. Pub. Sts. c. 157, § 98; *Forbes v. Howe*, 102 Mass. 427, 435; *Simpson v. Carleton*, 1 Allen, 109, 120; *Blodgett v. Hildreth*, 11 Cush. 311."

See also *Mason v. Pomeroy*, 151 Mass. 164, 173.

¹ *Stewart v. Platt*, 101 U. S. 731; *Hallack v. Tritch*, 17 B. R. 293; *Reber v. Gundy*, 13 Fed. Rep. 53, acc. See also *Re Little River Lumber Co.*, 92 Fed. Rep. 585.

But transferring security to a creditor of greater value than he previously had is a preference. *Waring v. Buchanan*, 19 B. R. 502; *Re Jones*, 100 Fed. Rep. 781; *Chipman v. McClellan*, 159 Mass. 363.

Why wasn't it the firm case? There the mortgage was recorded, & hence a greater than the Co.

able consideration, — to wit, the debt of \$27,839 in gold, due to Novelli & Co.; and it is not denied that it gave to Turpin the right to take possession of the property described in it. It was, therefore, a valuable security, even if there was an agreement not to record it. If it be said failure to put it on record enabled the debtor to maintain a credit which he ought not to have enjoyed, the answer is that the bankrupt act was not intended to prevent false credits. Its purpose is ratable distribution. But the evidence does not justify the assertion that there was in fact any agreement that the bill of sale should not be recorded, or that possession should not be taken under it.

Upon all points, therefore, the case is with the appellees, and the decree of the Circuit Court must be affirmed.

IN RE SHERIDAN.

DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA,
DECEMBER 16, 1899.

[Reported in 98 Federal Reporter, 406.]

In bankruptcy. The referee in bankruptcy found that a pledge of personal property by the bankrupt to one of his creditors was an unlawful preference under the bankruptcy act, and made an order requiring the creditor, who had sold the goods pledged, to pay over the proceeds to the trustee in bankruptcy. The case is now before the court on the creditor's exceptions to such decision of the referee.

John K. Kane, for exceptant.

Greenwald & Mayer and *Charles Biddle*, for certain creditors.

McPHERSON, District Judge. The exceptant relies on *Ex parte Potts*, Fed. Cas. No. 11,344, but an examination of that case will show that the decision was upon a different state of facts. One question there was whether a pledge actually made was fraudulent; and it appeared that the alleged bankrupts, when they were admittedly solvent, had assigned to a creditor, as collateral security for advances, several policies of insurance and bills of lading upon a vessel and cargo then at sea. Under such circumstances, it was correctly held that the transfer was not in fraud of creditors. The assignment of the policies was a completed transfer of the debtor's interest in those instruments, and the assignment of the bills of lading transferred the title to the property therein described, without any further act. As to almost all the property then under consideration, therefore, the transaction had been fully executed. One policy or one bill of lading was apparently not transferred until May, when the alleged bankrupts had become "involved" (there was no averment of insolvency in the petition); but as the last advance by the creditor had been made in March, in pursuance of an

agreement made in February, the court was clearly right in holding that no part of the transaction was fraudulent. No question of preference arose, whereas here the question is one of preference simply. The goods here were never actually pledged until the exceptant, for the first time, took them into his possession a few days before the petition was filed. Before that time there was a mere agreement to pledge. The goods were never delivered to the exceptant, nor (assuming, for present purposes, that this would have been good against the other creditors) were they even set apart and continuously treated as his property. Under the facts proved, the pledge was not completed until the date of removal. *Lucketts v. Townsend*, 49 Am. Dec. 730, note. This being so, the exceptant's title attached upon that date, and the transfer created a preference in violation of the act.

The exceptions to the finding of the referee are overruled, and his order directing the exceptant to pay to the trustee the money received from the sale of the goods in question is approved.¹

¹ *Casey v. Cavaroc*, 96 U. S. 467; *Nisbit v. Macon Bank*, 12 Fed. Rep. 686; *Re Klingman*, 101 Fed. Rep. 691; *Hitchcock v. Hassett*, 71 Cal. 331; *Copeland v. Barnes*, 147 Mass. 388; *Rowell v. Claggett*, 69 N. H. 201, *acc.* *Martin v. Reid*, 11 C. B. (n. s.) 730, *contra*. See also *Hook v. Ayers*, 80 Fed. Rep. 978 (C. C. A.); *Huntington v. Sherman*, 60 Conn. 463, 467; *Keiser v. Topping*, 72 Ill. 226; *Tuttle v. Robinson*, 78 Ill. 332.

An agreement made for value to mortgage property sufficiently specified for clear identification has been held to give an equitable lien. *Holroyd v. Marshall*, 10 H. L. C. 191; *Collyer v. Isaacs*, 19 Ch. D. 351; *Coombe v. Carter*, 36 Ch. D. 348; *Tailby v. Official Receiver*, 13 A. C. 523; *Cumberland Banking Co. v. Mayport Iron Co.*, [1892] 1 Ch. 415; *Re Dublin Co.*, L. R. 13 Ir. 174; *Pennock v. Coe*, 23 How. 117; *Butt v. Ellett*, 19 Wall. 544; *Beall v. White*, 94 U. S. 382; *Mitchell v. Winslow*, 2 Story, 630, 644; *Brett v. Carter*, 2 Low. 458; *Barnard v. Norwich Co.*, 14 B. R. 469; *Freights of the Kate*, 63 Fed. Rep. 707, 714; *Robinson v. Mauldin*, 11 Ala. 977; *Floyd v. Morrow*, 26 Ala. 344; *Apperson v. Moore*, 30 Ark. 56; *Grand Forks Nat. Bank v. Minneapolis Co.*, 6 Dak. 357; *Gregg v. Sanford*, 24 Ill. 17; *Scharfenburg v. Bishop*, 35 Ia. 60; *Sawyer v. Long*, 86 Me. 543; *Dexter v. Curtis*, 91 Me. 505; *Butler v. Rahm*, 46 Md. 541; *Hudson v. McKale*, 107 Mich. 22; *Ludlum v. Rothschild*, 41 Minn. 218; *Sillers v. Lester*, 48 Miss. 513; *Keating v. Hannenkamp*, 100 Mo. 162; *Cumberland Nat. Bank v. Baker*, 57 N. J. Eq. 231; *McCaffrey v. Woodin*, 65 N. Y. 459; *Coates v. Donnell*, 94 N. Y. 168; *Kribbs v. Alford*, 120 N. Y. 519 (but see *Rochester Co. v. Rasey*, 142 N. Y. 570; *New York Co. v. Saratoga Co.*, 159 N. Y. 137 *contra*); *Collins App.*, 107 Pa. 590; *Williams v. Winsor*, 12 R. I. 9; *Parker v. Jacobs*, 14 S. C. 112; *Hirshkind v. Israel*, 18 S. C. 157; *Tedford v. Wilson*, 3 Head, 311; *First Bank v. Turnbull*, 32 Gratt. 695; *Braxton v. Bell*, 92 Va. 229, 235. See also *Re Jackson Mfg. Co.*, 15 B. R. 438; *Nash v. Le Clercq*, 17 Fed. Cas. No. 10,021; *Stover v. Kennedy*, 23 Fed. Cas. No. 13,510; *Southwick v. Whipple*, 2 Fed. Rep. 770; *Re Wood*, 5 Fed. Rep. 443; *Douglass v. Vogeler*, 6 Fed. Rep. 53.

But see *contra*, *Ross v. Wilson*, 7 Bush, 29; *Loth v. Carty*, 85 Ky. 591; *Manly v. Bitzer*, 91 Ky. 596, 598; *Moody v. Wright*, 13 Met. 17; *Chase v. Denny*, 130 Mass. 566; *Cook v. Blanchard*, 144 Mass. 207; *Moors v. Reading*, 167 Mass. 322; *Smith v. Howard*, 173 Mass. 88; *Rochester Co. v. Rasey*, 142 N. Y. 570; *New York Co. v. Saratoga Co.*, 159 N. Y. 137; *Phelps v. Murray*, 2 Tenn. Ch. 746; *Chynoweth v. Tenney*, 10 Wis. 397; *Merchants' Bank v. Lovejoy*, 84 Wis. 601. See also *Robinson v. Elliott*, 22 Wall. 513; *Collins v. Myers*, 16 Ohio, 547; *Francisco v. Ryan*, 54 Ohio St. 307.

In Massachusetts, though a mortgage of goods to be acquired gives no title legal or equitable, yet if possession is actually taken a title is thereby gained which is good

SECTION II. (*continued*).

(f) COLLATERAL EFFECTS OF PREFERENCE.

SAWYER v. LEVY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER 26—OCTOBER 18, 1894.

[*Reported in 162 Massachusetts, 190.*]

TRUSTEE process. Writ dated April 22, 1893. T. L. Haynes, summoned as trustee, answered that at the time of the service of the writ upon him he had certain funds in his hands due the defendants; and that prior to the service of the writ he had received notice that the funds had been assigned to one Aaron Slater, who demanded payment thereof. Slater appeared as claimant of the funds in the hands of the trustee, under the assignment.

At the trial in the Superior Court, before MASON, C. J., without a jury, Slater testified that, at the time of making the assignment, the defendants were indebted to him in a large sum; and that the accounts transferred to him by the assignment, including that due from the trustee, being insufficient to secure him for said indebtedness, the defendants, who were doing business in the city of New York, confessed judgment to him for the difference between the amount of their indebtedness and the amount due on the accounts so transferred.

The judgment having been confessed on the same day that the assignment was made, no general assignment for the benefit of creditors was made by the defendants.

The plaintiffs requested the judge to rule that the assignment was invalid against the attachment made by the plaintiffs upon their writ.

The judge declined to rule as requested; found for the adverse claimant; ordered that the trustee be discharged with costs to both the trustee and the claimant; and found specially that the assignment by the defendants to the claimant was in consideration of a *bona fide*

though the mortgagor was then insolvent, and immediately afterwards was adjudicated insolvent under the State insolvency law. *Blanchard v. Cooke*, 144 Mass. 207, 222-226; *Bliss v. Crosier*, 159 Mass. 498.

An agreement to sell manufactured goods which were paid for in advance was held to give an equitable lien upon the goods as they were manufactured in *Scammon v. Bowers*, 1 Hask. 496. See also *Hamilton v. Nat. Loan Bank*, 3 Dill. 230; *Post v. Corbin*, 5 B. R. 11.

An agreement on the making of a mortgage that the insurance on the mortgaged premises should be kept up, and the loss, if any, made payable to the mortgagee, was held to give the latter an equitable lien on the proceeds of the policies, though in fact neither made payable or delivered to him. *Re Wittenberg Co.*, 108 Fed. Rep. 593. See also *Re Little River Lumber Co.*, 92 Fed. Rep. 585.

existing debt to the full amount thereof, and, at the time of the assignment, the defendants were in an insolvent condition, and the claimant had knowledge of such condition. The plaintiffs alleged exceptions.

F. H. Gillett & W. W. McClench, for the plaintiffs.

T. M. Brown, for Aaron Slater.

ALLEN, J. The assignment by the defendants to Slater was no doubt a preference, which might be avoided by assignees in insolvency if the defendants were subject to our insolvent laws. Pub. Sts. c. 157, § 96. But no proceedings in insolvency could be taken against them by reason of their non-residence. A preference given by an insolvent debtor to a bona fide creditor cannot be avoided by an attaching creditor, whether the form of preference which is adopted is a general assignment for the benefit of such creditors as should assent thereto, or an assignment for the benefit of certain specified creditor or an assignment directly to a single creditor. Otherwise, it would simply amount to giving a preference to the attaching creditor, instead of to the creditor or creditors selected by the debtor. This has often been adjudged. National Mechanics & Traders' Bank v. Eagle Sugar Refinery, 109 Mass. 38; Banfield v. Whipple, 14 Allen, 13; Train v. Kendall, 137 Mass. 366; First National Bank of Easton v. Smith, 133 Mass. 26. *Exceptions overruled.*¹

FOX v. GARDNER.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1874.

[Reported in 21 Wallace, 475.]

ERROR to the Circuit Court for the Western District of Wisconsin, the case being thus:—

Fox & Howard had contracted with a railroad company to make its railroad, and on the 4th of October, 1870, employed one N. Young as a contractor (excavator) under them. By the terms of the contract with Young, Fox & Howard were to pay him, on the 15th of December, 1870, a certain sum per cubic yard of earth excavated; payments to be made as follows:—

"To the laborers employed in doing said work the amount ascertained to be due to them for their services and the balance to the said Young."

Young finished his work November 24, 1870, and being in debt to

¹ *Priest v. Brown*, 100 Cal. 626; *Trustees v. Jarvis*, 32 Conn. 412; *Greenthal v. Lincoln*, 67 Conn. 372; *Keane v. Goldsmith*, 14 La. Ann. 349; *Triebert v. Burgess*, 11 Md. 452; *Traders' Nat. Bank v. Steere*, 165 Mass. 389, *acc.* See also *Bartlett v. Walker*, 65 Vt. 594.

one Burrows, as also to three other persons severally, to the extent of \$3,692, gave to him and them drafts on Fox & Howard for different amounts, in all making that sum, payable December 15, 1870. Fox & Howard accepted the drafts in this form:—

“Accepted and promised to be paid out of any money due N. Young, in our hands, after payment of laborer’s lien and orders previously accepted. Done this 1st day of December, at eight o’clock P.M.

“FOX & HOWARD.”

About the same time various laborers under Young, and thus creditors of Young, also gave drafts (in all for \$502), on him in favor of Burrows, who cashed or discounted them, and by Young’s directions Fox & Howard charged him, Young, with the amount of the drafts as cash paid to him; they agreeing, at the same time, with Burrows, to pay to him the amount of the drafts, but not actually paying them.

When Young gave these different drafts he was insolvent; and on the 7th of January, 1871, a petition in bankruptcy was filed against him, on which he was, upon the same day, decreed a bankrupt.

One Gardner being appointed his assignee brought this suit in the court below, September 12th, 1872, against Fox & Howard, to compel the payment to him of what they had owed Young, and had agreed to pay to Burrows and the others, in the manner already stated. The ground of the suit was of course that the transactions were void under the thirty-fifth section of the bankrupt act, quoted *supra*, 365.

The court charged the jury that before the plaintiff could recover he was bound, under the thirty-fifth section of the act, to show: 1st. That Young was insolvent when the drafts were given. 2d. That Fox & Howard had reasonable cause to believe him insolvent. 3d. That the person or persons, in such case respectively, to whom the drafts were given, had reasonable cause to believe Young insolvent. And further, that Fox & Howard had reasonable cause to believe that the person or persons to whom they were so given had, when they took the same, reasonable cause to believe Young insolvent. But that if he satisfied the jury, by the evidence, of all these things, the acceptances of Fox & Howard were void, and did not amount to payments in the action.

Under these instructions the jury found for the assignee the amounts claimed, and Fox & Howard brought the case here on exceptions to the charge.

Mr. R. T. Merrick (with whom was *Mr. B. G. Caulfield*), for the plaintiff in error.

The court below was mistaken in its construction of the thirty-fifth section of the bankrupt act. That section does not authorize suits by an assignee against debtors of the bankrupt who have discharged their debts to him, or paid money to other persons for his use, within the period of four or six months specified in the act. It only authorizes suits against such creditors of the bankrupt as have fraudulently

received such payments. Only the parties *benefited* by a fraudulent preference under the bankrupt act are liable to the assignee.

The doctrine of the District Court leads to the most disastrous consequences. For if a debtor cannot respect the orders of a man in embarrassed circumstances except at his peril, then he will necessarily precipitate the condition of insolvency and bankruptcy which a different course might have prevented. It is believed that this doctrine is contrary to common justice and the established principles of law.

As respects Fox & Howard, the verdict and judgment below were very hard. If affirmed here, those persons have to pay the same debt twice; once to Burrows and the other holders of their acceptances, and again to the assignee in bankruptcy.

Mr. W. F. Vilas, contra.

Mr. Justice HUNT delivered the opinion of the court.

The thirty-fifth section of the bankrupt act provides that a transaction like the one under consideration here "shall be void, and the assignee may recover the property or the value of it from the person so receiving it or so to be benefited."

The language of the statute authorizing the assignee "to recover the property, or the value of it, from the person so receiving it or so to be benefited," does not create a qualification or limitation of power. There is no implication that the party paying is not also liable. The words are those of caution merely, and give the assignee no power that he would not possess if they had been omitted from the statute. In the present case the property or value attempted to be transferred belonged originally to the bankrupt. On the adjudication of bankruptcy the possession and ownership of the same were transferred to the assignee.¹ The attempted transfer by the bankrupt was fraudulent and void. It follows logically that the debtor yet holds it for the assignee, and that the assignee may sue him for its recovery.

Upon principle there would seem to be scarcely room for doubt upon the point before us. The pretended payment or transfer or substitution by the debtor of the bankrupt was in fraud of the act and illegal. It was a transaction expressly forbidden by the statute. The jury found that the insolvency of Young was known to Fox & Howard, and to the creditors by whom the drafts were taken at the time they were taken; that they were given by the bankrupt with intent to create forbidden preferences, and that they were accepted by Fox & Howard in fraud of the act. This is a transaction expressly condemned by the statute.

It amounts simply to this: the debtor of the bankrupt seeks to protect himself against an admitted debt by pleading a payment or substitution which was in fraud of the bankrupt act, and, therefore, void. The proposition carries its refutation on its face. Fox & Howard were indebted to the bankrupt and can only discharge them-

¹ Section 14 of the bankrupt act.

² See *Bolander v. Gentry*, 36 Cal. 105; *Hanson v. Herrick*, 100 Mass. 323.

selves by a payment or satisfaction which the law will sanction. A payment or transfer condemned by the express terms of the bankrupt act cannot protect them.

It is to be observed, also, that when the bankruptcy proceedings were begun Fox & Howard had never, in fact, paid to Burrows and his associates the amount of the drafts accepted by them. They had simply promised to pay them, if there should prove upon settlement of their accounts with the bankrupt to be so much money due to him. This presents them in a still less favorable condition. They owe money to the bankrupt. They are sued for it by his assignee in bankruptcy. As a defence they allege that they have made an agreement with Burrows and others, with the assent of the bankrupt, to pay the amount of the debt to them. They allege an agreement merely. This agreement has already been shown to be illegal. The assignee, representing the creditors as well as the bankrupt, is authorized to set up such illegality. The bankrupt perhaps could take no action to avoid this agreement, but his assignee has undoubted authority to do so. When the assignee sets up this illegality and sustains it by proof of the facts referred to, the whole foundation of the defence falls.

It is well settled that a debtor may pay a just debt to his creditor at any time before proceedings in bankruptcy are taken. It is also true that a valid agreement to substitute another person as creditor may be made, and may be pleaded as a discharge of the debt in the nature of payment. It is not, however, payment in fact, and is binding only when the contract is fair and honest and binding upon the first creditor.

The right of an insolvent person before proceedings are commenced against him to pay a just debt, honestly to sell property for which a just equivalent is received, to borrow money and give a valid security therefor, are all recognized by the bankrupt act, and all depend upon the same principle. In each case the transaction must be honest, free from all intent to defraud or delay creditors, or to give a preference, or to impair the estate.¹

If there is fraud, trickery, or intent to delay or to prefer one creditor over others, the transaction cannot stand.

It is urged that Fox & Howard are liable upon the drafts to the creditors of Young, in whose favor the acceptances were given. Should this be so it would but add another to that large class of cases in which persons endeavoring to defraud others are caught in their own devices. The law looks with no particular favor on this class of sufferers.

In the present case, however, there seems to be no such difficulty. The acceptances were a part of an illegal contract, and no action will lie upon them in favor of those making claim to them. They are guilty parties to the transaction and can maintain no action to enforce

¹ See Cook v. Tullis, 18 Wall. 332; Tiffany v. Boatman's Institution, Ib. 376.

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It will be observed that payments in money are not expressly mentioned. Transfers of property are, and one of the contentions of appellants is that by "transfers of property" payments in money are not intended. The contention is easily disposed of. It is answered by the definitions contained in section 1. It is there provided that "transfer" shall include the sale and every other and different mode of disposing

¹ Nellis v. Clark, 20 Wend. 24; s. c., 4 Hill, 424; Randall v. Howard, 2 Black, 585; Kennett v. Chambers, 14 How. 38, acc.

² Similarly a transfer to one who pays in return money which he knows will be used in giving a preference may be avoided. *Ex parte* Mendell, 1 Low. 506; Scammon v. Hobson, 1 Hask. 406; Bucknam v. Goss, 1 Hask. 630; Cramton v. Tarbell, 6 Fed. Cas. No. 3,349; Crafts v. Belden, 99 Mass. 535; Bush v. Boutelle, 156 Mass. 167, 171. But see *contra*, Van Kleeck v. Miller, 19 B. R. 484.

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templation of the filing of a petition by or against him, *pay money or transfer property* to an attorney and counsellor at law, solicitor in equity, or proctor in admiralty, for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor, and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate."

That all the words of a statute should, if possible, be given effect we concede, but tautology sometimes occurs. Is there not an example in subdivision *e* of section 67 (which, by the way, and notwithstanding, is relied on by the appellants)? It provides that "all conveyances, transfers, assignments, or encumbrances of his property, or any part

thereof, made or given by a person adjudged a bankrupt," in fraud of creditors, shall be null and void as to them.

Manifest tautology, but certainly not used to detract from the definition of "transfer" in section 1, or to exclude application of that section in proper cases. Conveyances, assignments, and encumbrances of property are but modes of its absolute or conditional disposition (transfer), as payment of money is a mode of its disposition (transfer), and there was a particular expression of each mode on account of the primary purpose to be secured in each case, — the purpose being, in 60 *d*, to control payments to attorneys; in 67 *e* the purpose being to prohibit the disposition of property by the debtor to persons other than creditors in fraud of the act.¹

But, construing transfers of property to include payments of money, it is nevertheless urged that, not only must the act and state of mind of the giving debtor be considered, but the act and state of mind of the receiving creditor must be considered. It is not enough that an advantage in fact be given, but to make it a preference "the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference." In other words, it is contended that the quoted words should be read into subdivision *a* from subdivision *b*, and the necessity of doing so is claimed to be established by other sections of the statute.

Section 60 *b* is as follows: —

"If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

Subdivisions *a* and *b* are concerned with a preference given by a debtor to his creditor. Subdivision *a* defines what shall constitute it, and subdivision *b* states a consequence of it, — gives a remedy against it. The former defines it to be a transfer of property which will enable him to whom the transfer is made to obtain a greater percentage of his debt than other creditors. The latter provides a consequence to be that the transfer may be avoided by the trustee and the property or its value recovered; provided, however, that the preference was given within four months before the filing of the petition in bankruptcy or before the adjudication, and the creditor had reason to believe a preference was intended. So far, so clear. If the conditions mentioned exist, the preference may be avoided. But if the person receiving the preference did not have cause to believe it was intended, what then? It follows that the condition being absent, its effect will be absent.

¹ *Re Conhaim*, 97 Fed. Rep. 923; *Re Sloan*, 102 Fed. Rep. 116; *Re Fixen*, 102 Fed. Rep. 295 (C. C. A.); *Chism v. Citizens' Bank*, 27 South Rep. 637 (Miss.), *acc.*

In other words, he may keep the property transferred to him, whether it be a complete or partial discharge of his debt. But if only a partial discharge, may he prove the balance of his debt or other debts?

Section 57 *a* provides for such case. "The claims of creditors," it provides, "who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

There is certainly no ambiguity so far. What a preference is, is plain. What the effect of it is, if taken under the condition mentioned, is equally plain. So taken, it may be recovered back. If not so taken, it may be kept or surrendered. Unless surrendered, he who received it cannot prove his debt or other debts. His election is between keeping the preference and surrendering it. That is the favor of the law to his innocence, but, aiming to secure equality between him and other creditors, can the law indulge further? He may have been paid something, — maybe a greater percentage than other creditors can be. That is his advantage, and he may keep it. If paid a less percentage he can obtain as much as other creditors by surrendering the payment, and an equality of distribution of the assets of the bankrupt is assured. The effect is equitable, and that it was intended is supported by prior legislation.

The bankrupt act of 1867 had provisions against preferences. Sections 23 and 35, 5084 and 5128, Rev. Stat. They could be recovered, and had to be surrendered to enable the creditor to prove his debt, but the law was careful to express upon what condition in each case. They could be recovered back if the creditor had "reasonable cause to believe" the debtor was insolvent, and they were given "in fraud of the provisions of this title." Section 5128, Rev. Stat. They had to be surrendered if received under like condition. Section 5084, Rev. Stat., provided that "any person who . . . has accepted any preference having reasonable cause to believe that the same was made or given by the debtor contrary to any provisions of the act of March 2, 1869, chap. 176, . . . shall not prove the debt or claim on account of which the preference is made or given, nor shall he receive any dividend therefrom until he shall first surrender to the assignee all property, money, benefit, or advantage received by him under such preference."¹

¹ Under this statute it was held that a creditor who had received a preference, with reasonable cause to believe that it was given by the debtor contrary to the provisions of the bankruptcy act might nevertheless prove, without surrendering the preference, any claim entirely distinct from that as to which he had been preferred. *Re Richter*, 1 Dill. 544; *Re Holland*, 8 B. R. 190; *Re Lee*, 14 B. R. 89; *Re Aspinwall*, 11 Fed. Rep. 136; *Re McVay*, 13 Fed. Rep. 443.

It was, however, held that to enable a creditor to prove a claim as to which he had received a preference it was necessary that he should voluntarily surrender the preference. After a judgment against him for the recovery of the preference, it was too late to claim the exemption accorded to those who surrender their preferences. At any time before the rendition of judgment the surrender could be made effectively. *Re Richter*, 1 Dill. 544; *Re Stephens*, 3 Biss. 187; *Re Reece*, 2 Bond, 359; *Coxe v. Hale*, 10 Blatchf. 56; *Re Walton*, Deady, 598; *Re Montgomery*, 3 Ben. 565; *Re Davidson*, 3 B. R. 418; *Re Tonkin*, 4 B. R. 52; *Re Scott*, 4 B. R. 414; *Re Kipp*,

The words in italics are omitted from the act of 1898. Was the omission without purpose? The omission of a condition is certainly not the same thing as the expression of a condition. Was it left out in words to be put back by construction? Taken from the certainty given by prior use and prior decisions, and committed to doubt and controversy? There is a presumption against it. When the purpose of a prior law is continued, usually its words are, and an omission of the words implies an omission of the purpose. This rule we lately applied in *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. Ed. 1175, 20 Sup. Ct. Rep. 1000. In that case, in determining whether the jurisdiction of the circuit and district courts of the United States was concurrent with the State courts in certain suits at law and equity between the assignee in bankruptcy and the adverse claimant of property of the bankrupt, the statutes of 1841 and 1867 were compared with that of 1898, and from the omission from the latter of certain provisions of the former statutes it was decided that such jurisdiction did not exist. It was said by the court, speaking by Mr. Justice Gray: "We find it impossible to infer that when Congress, in framing the act of 1898, entirely omitted any similar provision, and substituted the restricted provisions of section 23, it intended that either of those courts should retain the jurisdiction which it had under the obsolete provision of the earlier acts."

We might rest the discussion here, but counsel have ably urged against our interpretation, of the statute considerations which should be noticed. They assert its incorrectness because: (1) That the provisions of 57 *g*, which denies allowance to the claims of creditors unless such creditors surrender the preferences they have received, are penal and should be strictly construed. Being penal, it is contended, there should be a guilty intent to incur their punishment. (2) Of the defectiveness of 60 *a*, and the necessity of explaining it and enlarging it by other provisions. (3) Of the consequences of the construction,—consequences which are declared to be anomalous and even absurd.

4 B. R. 593; *Re Forsyth*, 7 B. R. 174; *Re Leland*, 9 B. R. 209; *Re Jordon*, 9 B. R. 416; *Re Riorden*, 14 B. R. 332. Indeed in some cases the court either suspended the formal entry of judgment or allowed surrender after a finding of facts in order to give a creditor who had received a recoverable preference, but was not guilty of actual fraud, an opportunity to make surrender in time. *Zahm v. Fry*, 9 B. R. 546; *Burr v. Hopkins*, 6 Biss. 345.

According to the weight of authority, though the question was regarded as doubtful after the amendment of June 22, 1874, the penalty of forfeiture of his claim was only applicable to a creditor who had been guilty of actual fraud. *Burr v. Hopkins*, 6 Biss. 345; *Re Black*, 17 B. R. 399; *Re Newcomer*, 18 B. R. 85; *Re Kaufman*, 19 B. R. 283; *Re Reed*, 3 Fed. Rep. 798; *Re Cadwell*, 17 Fed. Rep. 693. But see *contra*, *Re Cramer*, 13 B. R. 225; *Re Stein*, 16 B. R. 569; *Re Graves*, 9 Fed. Rep. 816.

Under the present act the question seems not to have been passed on except by referees. In *Re Baker*, 2 N. B. N. 195, the referee held that a preferred creditor not guilty of actual fraud was entitled to prove on payment of a judgment recovered against him by the trustee. In *Re Beiber*, 2 N. B. N. 943, the referee, following the decisions under the act of 1867, denied such a right.

1. We cannot concur in the view that 57 *g* is a penal requirement. It is hardly necessary to assert that the object of a bankrupt act, so far as creditors are concerned, is to secure equality of distribution among them of the property of the bankrupt,—not among some of the creditors, but among all of them. Such object could not be secured if there were no provisions against preferences,—no provisions for defeating their purpose. And it is no reflection on the statute that it does not do so entirely. It allows complete payments, and counsel has seen and urges what seems to be inequitable in that,—the giving favor to the diligence which secured it,—and strongly argues that if complete payments may be retained without penalty, why not partial payments; if diligence (and diligence is made a great deal of in the argument) is favored in the one case, why not in the other? The view is too narrow and partial. Comparing such creditors, there may be inequality, but, considering other creditors, what shall be said? Some thought must be had of them, and considering them—indulgent creditors as well as diligent creditors—an attempt to secure the best remedies and results in the circumstances was, no doubt, the aim of the legislature. And advantage may be left with the preferred creditor. As we have already said, if the preference exceed the share of the bankrupt's estate which the creditor would be entitled to, he may keep the preference. If it be less, he may surrender it and share equally with the other creditors. If the purposes of the statute are to be considered, this is certainly not punishment, but benefit. If it is discrimination at all, it is discrimination against the other creditors.

2. Undoubtedly all the sections of the act must be construed together as means to effect its purpose, and some of its sections are closely related. It does not follow, however, that each section should not be given the meaning its language conveys, if clear and consistent. It does not follow that because the terms of a section are defined elsewhere, or the consequences of its provisions are expressed elsewhere, that it becomes a nullity, or that it is defective. Not that we may not "travel outside," to use counsel's expression, of any section, if it be necessary to travel outside. We may travel outside for some things, not necessarily for all things. The argument is, you must travel outside of subdivision *a* for a time within which the preference must have been given, and four months are selected in analogy to subdivision *b* and of section 3 *b*. This may be conceded, and the meaning of subdivision *a* would not be otherwise altered. There would still remain a clear definition of a preference.

The argument is strong which is urged to support a four months' limitation, but it can be argued in opposition that subdivision *a* needs no explanation from other parts of the statute "in order to obtain a time limit on the question of preference." It can be argued that subdivision *a* gives such limit in the existence of insolvency. But we are not required to decide either way on this record. A time limit is entirely independent of the belief of the creditor or of the belief which

may be attributed to him,—entirely independent of his right to a greater proportion of the bankrupt's property than other creditors. It is urged, however, that a time limit—whether of four months, or extending indefinitely before the filing of the petition in bankruptcy, having no limit but the Statute of Limitations—differently affects the creditor receiving the preference, and the difference should be considered in construing the statute. It is pointed out that insolvency has a different meaning under the act of 1898 than it had under the act of 1868. Under the latter, the debtor was insolvent when he was unable to pay his debts in the ordinary course of business. Under the former, when the aggregate of his property at a fair valuation is insufficient to pay his debts, and, it is said, this being practically impossible to ascertain on account of the uncertainty of its factors, therefore a time limit to a preference is necessary, and also that there should be a guilty knowledge on the part of the creditor of the guilty intent upon the part of the debtor. There are two weaknesses in the argument. It ascribes a penal character to section 57 *g*, and regards the requirement of the surrender of the preference as a condition of proving debts as a punishment, and not a provision to secure equality among creditors. On this we have sufficiently commented. The other weakness in the argument is that it exaggerates the difference between the definitions of insolvency, and overlooks an advantage to the creditor in the definition contained in the act of 1898. Inability to pay debts in the ordinary course of business usually accompanies an insufficiency of assets. It may not, of course. At times a debtor's property, though amply sufficient in value to discharge all of his obligations, may not be convertible without sacrifice into that form by which payments may be made. The law regards that possibility. In this there is indulgence to the debtor, and through him to preferred creditors. But the discussion need not be extended. The law has made its definition of insolvency, whatever the effect may be, and has determined by that definition consequences, not only to the debtor, but to his creditors and to purchasers of his property.

3. It is but one rule of construction that the consequences of a statute may be considered in construing its meaning. The rule may be counterpoised by other rules; it may be prevailed over by that one which requires the intent of the statute to be looked for in its words. Where they are clear and involve no absurdity, they are its only expositors. It is not contended that the provisions which we are considering are not clearly expressed and adequate to convey a definite meaning. It is true, it is urged that the word "preference" imports the conscious participation of the creditor and debtor in the same intent. We cannot concur in that view, and we are brought to the consequences of the construction which we have put upon section 60. It is denominated absurd by appellants. What is the test of absurdity? The contradiction of reason, it may be said, and to make an immediate application to legislation the contradiction of the reason which grows

out of the subject-matter of the legislation and the purpose of the legislators. But all legislation is not simple, nor its consequences obvious, or to be controlled, even if obvious. Whether there should be any legislation at all, and its extent and form, may be matters of dispute. Its consequences may be viewed with favor or with alarm; some regretted, but accepted as inevitable, — accepted as the shadow side of the good. In such situation it is for the legislature to determine, and it is very certain that the judiciary should not refuse to execute that determination from its view of some consequence which (to use the thought and nearly the words of Chief Justice Marshall) may have been contemplated and appreciated when the act was passed, and considered as overbalanced by the particular advantages the act was calculated to produce. *United States v. Fisher*, 2 Cranch, 389, 2 L. Ed. 314. Therefore the sound rule expressed in *Sturges v. Crowninshield*, 4 Wheat. 202, 4 L. Ed. 550: "It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of an instrument expressly provide shall be exempted from its operation. Where words conflict with each other, . . . and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if in any case the plain meaning of a provision not contradicted by any other provision in the same instrument is to be disregarded because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application."

So, in *United States v. Goldenberg*, 168 U. S. 103, 42 L. Ed. 398, 18 Sup. Ct. Rep. 4, where Mr. Justice Brewer, answering the argument based on the consequences of an act of Congress against the meaning expressed by its words, said: —

"No mere omission, no mere failure to provide for contingencies, which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute. In the case at bar the omission to make specific provision for the time of payment does not offend the moral sense (*Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. Ed. 226, 12 Sup. Ct. Rep. 511); it involves no injustice, oppression, or absurdity (*United States v. Kirby*; 7 Wall. 482, 19 L. Ed. 278; *McKee v. United States*, 164 U. S. 287, 41 L. Ed. 437, 17 Sup. Ct. Rep. 92); there is no overwhelming necessity for applying in the one clause the same limitation of time which is provided in the other. *Non constat* but that Congress believed it had sufficiently provided for payments by other legislation in reference to retaining possession until payment or security therefor; or that it failed to appreciate the advantages which counsel insists will inure to the importer in case payment does not equally, with protest, follow within ten days from the action of the collector; or that, appreciating fully those advantages, it was not unwilling that he should enjoy them."

Let us apply these principles to the present case. The consequence of the construction of the Circuit Court of Appeals is said to be that it will "harass and embarrass the business of the country," and the specification is that any payment to a creditor may become a preference and the alternative forced upon him of giving it up or losing the right to prove his claim or claims against his debtor's estate. That consequence does not seem to us very formidable, even in the instance of payments to private bankers by their depositors, as illustrated by counsel or, as also illustrated, if the payments should be distributed as gifts to relatives, or to endow universities, and cannot be obtained to be surrendered. Granting that such situation may be produced, is it anything after all but putting the creditor to an election of comparative and debatable courses where some loss must occur, whichever be taken? Business life has many such examples, and a law which has that consequence in seeking equality among creditors is certainly not absurd in even the loosest and most inconsiderate meanings of the word. Other illustrations are used which present the same situation or depend upon it, — that is, the election which a preferred creditor is forced to make in order to prove his debts. A trader is insolvent and owes \$100,000. His assets are \$75,000. He owes \$50,000 to A and B; the other \$50,000 to other letters of the alphabet. He makes payments to the latter in order to prefer them, and then goes into bankruptcy. A and B, having nonpreferred, hence provable, claims, elect a trustee. What of the other creditors? Counsel, having full control of the imaginary situation, makes them ignorant of the debtor's affairs, and therefore unwilling to risk a division with A and B. That it is possible for such ignorance and doubt to exist may be conceded, but it does not occur to us how either can reasonably continue for the time debts may be proved against the estate under the disclosures required of the bankrupt by the statute, and the information obtained by the trustee of the estate in its administration.

But it is said a debtor may even make money by going into voluntary bankruptcy, and the result is worked out by circumstances carefully imagined to that end, combined with, as absolutely necessary to the result, the ignorance and timidity of creditors. The illustration is that, suppose a bankrupt has made partial payments to every one of his creditors within four months preceding bankruptcy; that his assets at the time of the filing of the petition amounted to \$50,000, and his liabilities to \$100,000. Hesitating in this extraordinary situation to surrender their payments, — no creditor being tempted by \$50,000, — the conclusion is confidently advanced that "if the construction of the court below is sound, there are no creditors who have probable claims against the bankrupt." And the query is put, Who gets the \$50,000? The implied answer is that the bankrupt gets them, and the result is easily pronounced absurd. It is an absurdity which the "construction of the court below" is not responsible for. What a court would do with such a scheme as a fraud upon the act, we are not called upon to

say. We may well doubt if a scheme of that kind will ever come up for decision. We find it impossible to conceive a case in which \$50,000, or, indeed, any surplus, would not be an inducement to some creditor to add it, or some portion of it, to the payment of his claim.

It is further contended "that to constitute a preference under the bankruptcy act within either 57 *g* or 60 *a*, at least *the intent on the part of the bankrupt to prefer must be present.*" In support of this it is said that an act of bankruptcy consists, under section 3 (2) of a transfer by a debtor while insolvent of any portion of his property to one or more of his creditors, *with intent* to prefer such creditors over other creditors, and in such case a petition in involuntary insolvency may be filed against him. Section 3 *b*. It is hence deduced, reading those provisions with section 60 *a*, that preferences under the latter must be taken with the intent declared in the former, because it is not reasonable to assume that Congress intended that there could be preferences which were not acts of bankruptcy. The claim overlooks the fact that the language of section 3 (2) implies a difference between a preference and the intent with which it is given, and, besides, confounds the different purposes of the sections and their different conditions. It was for Congress to decide whether the consequences to a debtor of being forced into bankruptcy so far transcended the consequences to a creditor by a surrender of his preference, as to make the former depend upon an intent to offend the provision of the statute, and the latter not so depend. And we see nothing unreasonable in the distinction or purpose. Nor does the contention of appellants find support in the provisions of the act of 1867, and the cases of *Mays v. Fritton*, 20 Wall. 414, 22 L. Ed. 389, and *Wilson v. City Bank*, 17 Wall. 473, 21 L. Ed. 723. In that act there was a careful expression of the intent of the debtor (§ 5021, Rev. Stat.), and as careful an expression of the state of mind of the preferred creditor. Sections 5084, 5128.

Nor, again, do we find anything which militates against our conclusion in subdivision *c* of section 60. That subdivision is applicable to the cases arising under *b*, and allows a set-off which otherwise might not be allowed.

The interpretation of the statute which we have given has also been given by the Circuit Court of Appeals of the Ninth Circuit, in a well-considered opinion by Circuit Judge Morrow, *Re Fixen*, 50 L. R. A. 605, 42 C. C. A. 354, 102 Fed. 295.

The second assignment of error is that the court erred in compelling the appellants to repay the amount of dividends received by them. Error is asserted because of the provision of subdivision *b* of section 23. The whole section is as follows:—

"Jurisdiction of the United States and State Courts.—*a*. The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees, in the same

manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"b. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.

"c. The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offences enumerated in this act."

The proceedings we are reviewing were not a suit within the meaning of that section, and the order of the court requiring the repayment of the dividend was properly and legally made. *Judgment affirmed.*¹

The CHIEF JUSTICE, Mr. Justice SHIRAS, Mr. Justice WHITE, and Mr. Justice PECKHAM dissent.

McKEY v. LEE.

CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT,
JANUARY 2, 1901.

[Reported in 105 Federal Reporter, 923.]

APPEAL from the District Court of the United States for the Northern District of Illinois.

The agreed facts of the case are as follows: On January 17, 1900, Patrick F. Ryan filed a voluntary petition in bankruptcy, and Edward McKey, the petitioner, was duly elected trustee in the bankruptcy proceedings. For four months prior to January 17, 1900, Ryan had been continuously insolvent, but Lee, Tweedy & Co., the respondents, were not aware of this, and had no reasonable cause to believe it until the petition in bankruptcy was filed.

¹ *Re Conhaim*, 97 Fed. Rep. 923; *Re Fort Wayne Electric Corp.*, 99 Fed. Rep. 400 (C. C. A.); *Re Sloan*, 102 Fed. Rep. 116; *Re Fixen*, 102 Fed. Rep. 295 (C. C. A.); *Re Rogers' Milling Co.* 102 Fed. Rep. 687; *Re Schmechel Cloak Co.*, 104 Fed. Rep. 65; *Re Teslow*, 104 Fed. Rep. 229; *Re Arndt*, 104 Fed. Rep. 235, acc.

Nor is it material that the preference related to a debt entirely distinct from that which the creditor afterwards seeks to prove. *Re Knost*, 99 Fed. Rep. 409; *Re Fort Wayne Electric Corp.*, 99 Fed. 400 (C. C. A.); *Re Rogers' Milling Co.*, 102 Fed. Rep. 687; *Re Teslow*, 104 Fed. Rep. 229. The referee's decision in *Re Jourdan*, 2 N. B. N. 581, is contra.

In the decisions cited above it seems to have been generally assumed that only payments or transfers made within four months before bankruptcy could be considered, but in the District of Massachusetts, Judge Lowell held in *Re Jones*, 4 Am. B. R. 563 that the debtor's insolvency fixed the only limitation.

On September 17, 1899, the bankrupt owed to Lee, Tweedy & Co. \$874.52. Lee, Tweedy & Co. received from said bankrupt, in the regular course of business, without knowledge of the insolvency of said Patrick F. Ryan, the following sums of money:—

“On the 3d day of October, A. D. 1899, the sum of \$500; on the 18th day of October, A. D. 1899, the sum of \$334.56, and on the 22d day of December, A. D. 1899, the sum of \$500, making a total of \$1,334.56 so received; that said several sums were received by said Lee, Tweedy & Co. in part payment of and duly credited upon the account and claim of said Lee, Tweedy & Co. against said bankrupt.

Lee, Tweedy & Co. sold and delivered merchandise to said bankrupt within the four months next preceding the time of the filing of said petition in bankruptcy herein, as follows:—

On September 23, 1899	\$93.84
On September 23, 1899	1,050.10
On September 23, 1899	112.50
On September 25, 1899	184.00
On September 28, 1899	196.68
On September 28, 1899	35.61
On September 28, 1899	23.05
On October 3, 1899	63.82
On October 3, 1899	359.43
On October 21, 1899	231.25
On December 1, 1899	54.00
On December 2, 1899	175.75
On December 2, 1899	34.50

Total amount of merchandise sold and delivered
by said claimants within said period of four
months \$2,614.53

On the 6th day of February, A. D. 1900, said Lee, Tweedy & Co. duly filed their claim against said estate for the sum of twenty-one hundred and eight dollars (\$2,108).

The referee allowed the claim against the objection of the trustee. The District Court modified this order, directing that the claim be disallowed unless Lee, Tweedy & Co. should surrender to the trustee \$500. If, however, such surrender was made the claim was then to be allowed for \$2,608.¹

From this ruling of the District Court the appeal was prosecuted.

S. A. Levinson, for appellant.

Charles F. Harding and *T. O. Bunch*, for appellees.

Before Woods and Grosscup, Circuit Judges, and Bunn, District Judge.

After the foregoing statement of the case, Grosscup, Circuit Judge, delivered the opinion of the court, as follows:—

¹ The statement of the case has been somewhat abbreviated.

Paragraph (g), section 57, of the bankruptcy act, provides :

"The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

Paragraph (a), section 60, provides :

"A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

Paragraph (b), section 60, provides :

"If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

Paragraph (c), section 60, provides :

"If a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."

Appellant insists that the payments made to Lee, Tweedy & Co. — one thousand, three hundred and thirty-four dollars and fifty-six cents — the 17th of September, 1899 (that being the beginning of the four months' period previous to the bankruptcy), were a preference, within the meaning of section 60, and that under paragraph (g), section 57, there must be a return of these payments, before the claim can be allowed.

The District Court held that the sale of goods to the bankrupt, after the payments, amounted, within the meaning of paragraph (c), section 60, to a further credit, in good faith, without security, of property going into the bankrupt's estate; and set off the value of such property against the payments, requiring, as a condition to the allowance of the claim, a return only of the surplus payment.

Counsel for appellant contends that paragraph (c), section 60, is not applicable to the facts stated; that it is intended to affect cases only where the trustee seeks to recover, by suit, preferential payments made to a person having had reasonable cause to believe that a preference was intended as provided for in paragraph (b), section 60; that the employment of the word "recoverable" shows that such a limitation of the right of set-off was intended.

We cannot concur in this interpretation. Confessedly, it would limit the right of set-off to those only who, having received the prefer-

ence knowingly, chose to stand out against its return to the trustee. The creditor willing to make return, without the delay and expense of a suit by the trustee, even though the preferential payments had been innocently received, could exercise this impulse toward obedience with the law only under penalty of losing what otherwise his recalcitrancy would have secured him. We ought not to lean toward an interpretation that would thus put the consenting creditor at a disadvantage, and afford a premium to the designing creditor.

There is nothing in the employment of the word "recoverable" that forces such an interpretation. The primary definition of the word is to "regain," to "get back again." Cent. Dict. A thing is "recoverable" when it is susceptible of being "regained," "gotten back." The law provides, alternatively, for the regaining of the preferential payments by the trustee, first by visiting the creditor with the danger of a penalty—the disallowance of any portion of his claim; and, secondly, in case of the knowing creditor, the right upon the part of the trustee to bring a suit. In either case the payments are gotten back,—there is a recovery,—and in both,—whether under stress of the penalty or by virtue of a suit,—it is the law that makes them recoverable.

Such interpretation compasses the reasonable purpose of the provision. It leaves the estate unimpaired; for the property of the creditor coming into the debtor's estate is presumably the equivalent of the money value at which it was purchased. It, in substance, simply cancels the effect of the preference, to the extent, only, that such preference no longer harms the interests of the other creditors.

*The order will be affirmed.*¹

¹ *Re Beswick*, 2 N. B. N. 808 (referee); *Re Ryan*, 105 Fed. Rep. 760, *acc.* *Re Thompson*, 2 N. B. N. 1016 (referee); *Re Christensen*, 101 Fed. Rep. 802, *contra*. See also *Re Arndt*, 104 Fed. Rep. 234.

SECTION III.

GENERAL ASSIGNMENTS.

WEST COMPANY v. LEA.

SUPREME COURT OF THE UNITED STATES, MAY 1-22, 1899.

[Reported in 174 United States, 590.]

WHITE, J. The facts stated in the certificate of the Circuit Court of Appeals are substantially as follows:—

Lea Brothers & Company and two other firms filed, on December 18, 1898, a petition in the District Court of the United States for the Eastern District of Virginia, praying that an alleged debtor, the George M. West Company, a corporation located in Richmond, Virginia, be adjudicated a bankrupt, because of the fact that it had, on the date of the filing of the petition, executed a deed of general assignment, conveying all its property and assets to Joseph V. Bidgood, trustee. The George M. West Company pleaded denying that at the time of the filing of said petition against it the corporation was insolvent, within the meaning of the bankrupt act, and averring that its property at a fair valuation was more than sufficient in amount to pay its debts. The prayer was that the petition be dismissed. The court rejected this plea, and adjudicated the West Company to be a bankrupt. The cause was referred to a referee in bankruptcy, and certain creditors secured in the deed of assignment, who had instituted proceedings in the law and equity court of the city of Richmond, under which that court had taken charge of the administration of the estate and trust under the deed of assignment, were enjoined from further prosecuting their proceedings, in the State court, under said deed of assignment. From this decree an appeal was allowed to the Circuit Court of Appeals for the Fourth Circuit. On the hearing of said appeal the court, desiring instructions, certified the case to this court. The certificate recites the facts as above stated, and submits the following question:—

“Whether or not a plea that the party against whom the petition was filed ‘was not insolvent as defined in the bankrupt act at the time of the filing of the petition against him’ is a valid plea in bar to a petition in bankruptcy filed against a debtor who has made a general deed of assignment for the benefit of his creditors.” *No*

The contentions of the parties are as follows: On behalf of the debtor it is argued that under the bankrupt act of 1898 two things must concur to authorize an adjudication of involuntary bankruptcy, first, insolvency in fact, and, second, the commission of an act of bankruptcy. From this proposition the conclusion is deduced that a debtor against whom a

proceeding in involuntary bankruptcy is commenced is entitled entirely irrespective of the particular act of bankruptcy alleged to have been committed, to tender, as a complete bar to the action, an issue of fact as to the existence of actual insolvency at the time when the petition for adjudication in involuntary bankruptcy was filed. On the other hand, for the creditors it is argued that whilst solvency is a bar to proceedings in bankruptcy predicated upon certain acts done by a debtor, that as to other acts of bankruptcy, among which is included a general assignment for the benefit of creditors, solvency at the time of the filing of a petition for adjudication is not a bar, because the bankrupt act provides that such deed of general assignment shall, of itself alone, be adequate cause for an adjudication in involuntary bankruptcy, without reference to whether the debtor by whom the deed of general assignment was made was in fact solvent or insolvent.

A decision of these conflicting contentions involves a construction of section 3 of the act of July 1, 1898, c. 541, 30 Stat. 546.

It will be observed that the section is divided into several paragraphs, denominated as *a*, *b*, *c*, *d* and *e*. Paragraph *a* is as follows:—

“SEC. 3. Acts of bankruptcy. — *a*. Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.”

It is patent on the face of this paragraph that it is divided into five different headings, which are designed numerically from 1 to 5. Now, the acts of bankruptcy embraced in divisions numbered 2 and 3 clearly contemplate not only the commission of the acts provided against, but also cause the insolvency of the debtor to be an essential concomitant. On the contrary, as to the acts embraced in enumerations 1, 4, and 5, there is no express requirement that the acts should have been committed while insolvent. Considering alone the text of paragraph *a*, it results that the non-existence of insolvency, at the time of the filing of a petition for adjudication in involuntary bankruptcy, because of the acts enumerated in 1, 4, or 5 (which embrace the making of a deed of general assignment) does not constitute a defence to the petition, unless provision to that effect be elsewhere found in the statute. This last consideration we shall hereafter notice.

The result arising from considering the paragraph in question would not be different if it be granted *arguendo* that the text is ambiguous.

For then the cardinal rule requiring that we look beneath the text for the purpose of ascertaining and enforcing the intent of the lawmaker would govern. Applying this rule to the enumerations contained in paragraph *a*, it follows that the making of a deed of general assignment, referred to in enumeration 4, constitutes in itself an act of bankruptcy, which *per se* authorizes an adjudication of involuntary bankruptcy entirely irrespective of insolvency. This is clearly demonstrated from considering the present law in the light afforded by previous legislation on the subject.

Under the English bankruptcy statutes (as well that of 1869 as those upon which our earlier acts were modelled), and our own bankruptcy statutes down to and including the act of 1867, the making of a deed of general assignment was deemed to be repugnant to the policy of the bankruptcy laws, and, as a necessary consequence, constituted an act of bankruptcy per se. This is shown by an examination of the decisions bearing upon the point, both English and American. In *Globe Insurance Co. v. Cleveland Insurance Co.*, 14 N. B. R. 311, 10 Fed. Cas. 488, the subject was ably reviewed and the authorities are there copiously collected. The decision in that case was expressly relied upon in *In re Beisenthal*, 14 Blatchf. 146, where it was held, that a voluntary assignment, without preferences, valid under the laws of the State of New York, was void as against an assignee in bankruptcy, and this latter case was approvingly referred to in *Reed v. McIntyre*, 98 U. S. 513. So, also, in *Boese v. King*, 108 U. S. 379, 385, it was held, citing (p. 387) *Reed v. McIntyre*, that whatever might be the effect of a deed of general assignment for the benefit of creditors, when considered apart from the bankrupt act, such a deed was repugnant to the object of a bankruptcy statute, and therefore was in and of itself alone an act of bankruptcy. The foregoing decisions related to deeds of general assignment made during the operation of the bankrupt act of 1867, March 2, 1867, c. 176, 14 Stat. 536, or the amendments thereto of June 22, 1874, c. 390, and July 26, 1876, c. 234, 18 Stat. 180; 19 Stat. 102. Neither, however, the act of 1867, nor the amendments to it, contained an express provision that a deed of general assignment should be a conclusive act of bankruptcy. Such consequence was held to arise, from a deed of that description, as a legal result, of the clause in the act of 1867, forbidding assignments with "intent to delay, defraud, or hinder" creditors and from the provision avoiding certain acts done to delay, defeat, or hinder the execution of the act. (Rev. Stat. 5021, par. 4, 7.) Now, when it is considered that the present law, although it only retained some of the provisions of the act of 1867, contains an express declaration that a deed of general assignment shall authorize the involuntary bankruptcy of the debtor making such a deed, all doubt as to the scope and intent of the law is removed. The conclusive result of a deed of general assignment under all our previous bankruptcy acts, as well as under the English bankrupt laws, and the significant import of the incorporation of the previous

rule, by an express statement, in the present statute have been lucidly expounded by Addison Brown, J. *In re Gutwillig*, 90 Fed. Rep. 475, 478.

But it is argued that whatever may have been the rule in previous bankruptcy statutes, the present act, in other than the particular provision just considered, manifests a clear intention to depart from the previous rule, and hence makes insolvency an essential prerequisite in every case. To maintain this proposition reliance is placed upon paragraph c of section 3, which reads as follows:—

"c. It shall be a complete defence to any proceedings in bankruptcy instituted under the first subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing the petition against him, and if solvency at such date is proved by the alleged bankrupt the proceedings shall be dismissed, and, under said subdivision one, the burden of proving solvency shall be on the alleged bankrupt."

The argument is that the words "under the first subdivision of this section" refer to all the provisions of paragraph *a*, because that paragraph, as a whole, is the first part of the section, separately divided, and although designated by the letter *a*, it is nevertheless to be considered, as a whole, as subdivision 1. But whether the words "first subdivision of this section," if considered intrinsically and apart from the context of the act, would be held to refer to paragraph *a* as an entirety or only to the first subdivision of that paragraph, need not be considered. We are concerned only with the meaning of the words as used in the law we are interpreting. Now, the context makes it plain that the words relied on were only intended to relate to the first numerical subdivision of paragraph *a*. Thus, in the last sentence of paragraph *c* the matter intended to be referred to by the words "first subdivision of this section," used in the prior sentences, is additionally designated as follows: "and under said subdivision one," etc., language which cannot possibly be in reason construed as referring to the whole of paragraph *a*, but only to subdivision 1 thereof.

This is besides more abundantly shown by paragraph *d*, which provides as follows:—

"d. Whenever a person against whom a petition has been filed as hereinbefore provided under the second and third subdivisions of this section takes issue with and denies the allegations of his insolvency, it shall be his duty to appear in court on the hearing with his books, papers, and accounts and submit to an examination, and give testimony as to all matters tending to establish solvency or insolvency, and in case of his failure to so attend and submit to examination the burden of proving his solvency shall rest upon him."

This manifestly only refers to enumerations 2 and 3 found in paragraph *a*, which, it will be remembered, make it essential that the acts of bankruptcy recited should have been committed by the debtor while insolvent. Indeed, if the contention advanced were followed, it would

render section 3 in many respects meaningless. Thus, if it were to be held that the words "first subdivision of this section," used in paragraph *c* referred to the first division of the section — that is, to paragraph *a* as a whole — it would follow that the words "second and third subdivisions of this section," used in paragraph *d*, would relate to the second and third divisions of the section — that is, to paragraphs *b* and *c*. But there is nothing in these latter paragraphs to which the reference in paragraph *d* could possibly apply, and therefore, under the construction asserted, paragraph *d* would have no significance whatever. To adopt the reasoning referred to would compel to a further untenable conclusion. If the reference in paragraph *c* to the "first subdivision of this section" relates to paragraph *a* in its entirety, then all the provisions in paragraph *a* would be governed by the rule laid down in paragraph *c*. The rule, however, laid down in that paragraph would be then in irreconcilable conflict with the provisions of paragraph *d*, and it would be impossible to construe the statute harmoniously without eliminating some of its provisions.

Despite the plain meaning of the statute as shown by the foregoing considerations, it is urged that the following provision contained in paragraph *b* of section 3 operates to render any and all acts of bankruptcy insufficient, as the basis for proceedings in involuntary bankruptcy, unless it be proven that at the time the petition was filed the alleged bankrupt was insolvent. The provision is as follows: "A petition may be filed against a person who is insolvent and who has committed an act of bankruptcy within four months after the commission of such act." Necessarily if this claim is sound, the burden in all cases would be upon the petitioning creditors to allege and prove such insolvency. The contention, however, is clearly rebutted by the terms of paragraph *c*, which provides as to one of the classes of acts of bankruptcy, enumerated in paragraph *a*, that the burden should be on the debtor to allege and prove his solvency. So, also, paragraph *d*, conforming in this respect to the requirements of paragraph *a*, contemplates an issue as to the second and third classes of acts of bankruptcy, merely with respect to the insolvency of the debtor at the time of the commission of the act of bankruptcy. Further, a petition in a proceeding in involuntary bankruptcy is defined in section 1 of the act of 1898, enumeration 20, to mean "a paper filed . . . by creditors *alleging the commission of an act of bankruptcy* by a debtor therein named."

It follows that the mere statement in the statute, by way of recital, that a petition may be filed "against a person who is insolvent and who has committed an act of bankruptcy," was not designed to superadd a further requirement to those contained in paragraph *a* of section 3, as to what should constitute acts of bankruptcy. This reasoning also answers the argument based on the fact that the rules in bankruptcy promulgated by this court provide in general terms for an allegation of insolvency in the petition and a denial of such allegation in the answer.

These rules were but intended to execute the act, and not to add to its provisions by making that which the statute treats in some cases as immaterial a material fact in every case. Therefore, though the rules and forms in bankruptcy provide for an issue as to solvency in cases of involuntary bankruptcy, where by the statute such issue becomes irrelevant, because the particular act relied on, in a given case, conclusively imports a right to the adjudication in bankruptcy if the act be established, the allegation of insolvency in the petition becomes superfluous, or if made need not be traversed.

Our conclusion, then, is that, as a deed of general assignment for the benefit of creditors is made by the bankruptcy act alone sufficient to justify an adjudication in involuntary bankruptcy against the debtor making such deed, without reference to his solvency at the time of the filing of the petition, the denial of insolvency by way of defence to a petition based upon the making of a deed of general assignment, is not warranted by the bankruptcy law; and, therefore, that the question certified must be answered in the negative; and it is so ordered.

VACCARO v. SECURITY BANK OF MEMPHIS.

CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, JULY 13, 1900.

[Reported in 103 Federal Reporter, 436.]

BEFORE LURTON, DAY, and SEVERENS, Circuit Judges.

LURTON, Circuit Judge, having made the foregoing statement of the case, delivered the opinion of the court.

1. The great bulk of the evidence found in the transcript of the record relates to the question of the solvency or insolvency of the firm of A. Vaccaro & Co. at the date of the commission of the alleged acts of bankruptcy. The fact of solvency or insolvency is of no moment in respect to the alleged "general assignment" made August 24, 1899. If the appointment of a receiver under the bill of the Memphis Security Company, administrator of A. Vaccaro, was, as charged, "a general assignment," within the meaning of subdivision 4 of section 3 of the bankrupt act of 1896, it was an act of bankruptcy, whether the firm was solvent or insolvent. West Co. v. Lea, 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098. Was the fact that a receiver was appointed in an uncontested suit the making of a general assignment? The situation was this: A. Vaccaro had died, leaving an estate worth at a valuation about \$115,000. He owed practically no individual debts. The firm assets, at a fair valuation, amounted to \$55,000, though nominally nearly double that sum. The individual estates of B. and A. B. Vaccaro, after paying individual debts, are valued at \$30,000. The firm indebtedness on August 24, 1899, was,

in round figures, \$124,000. Of this firm indebtedness \$53,000 was secured by a mortgage upon realty owned by A. Vaccaro and by pledge of personal securities owned by him individually. It was clear from these facts that the firm assets were wholly insufficient to pay firm debts, and that, after applying such assets, about \$69,000 of firm debts would remain unpaid. It was also clear from the facts stated that the estate of A. Vaccaro would have to bear a much greater part of the burden of the firm debts than its proportion. When the administrator of A. Vaccaro ascertained this situation, it determined in the interest of the estate, and for the purpose of adjusting the equities between the partners, to apply for the appointment of a receiver and the liquidation of the partnership affairs under the orders of the chancery court. A bill was accordingly prepared, which substantially stated the facts as above. The theory upon which the interposition of a court of equity was sought, was that the surviving partners had neither the means nor credit to provide for the payment of maturing debts, and that the estate of the deceased partner could not, at so early a stage of administration, be applied in the payment of debts of the firm; that creditors of the firm were, therefore, likely to resort to coercive suits, which would sacrifice the firm assets as well as the property of the estate pledged for firm debts. It was also plain that the protection of the estates would require an adjustment of equities between the partners, and that as large a sum as possible should be realized from the individual estates of the surviving partners, and applied to the relief of the estate of the deceased partner. The evidence shows that the administrator and its counsel went over the whole situation with the surviving partners and advised them of a firm purpose to file the bill and obtain a receiver. It is also satisfactorily shown that the surviving partners neither advised, counselled, nor procured the proceeding, and that all they did was to act upon the facts as they existed, and to decline to make opposition, being advised by counsel that a liquidation through a court of equity was the best course for the estate and the best for firm creditors, and that in all events their individual estates would be absorbed in the adjustment of equities between the partners after the payment of their individual debts. There is no evidence of collusion, fraud, or any other evil thing or purpose, and the business wisdom of the course proposed is most manifest. Resistance would have been in vain, for the interests of all were such as to call for the exercise of the powers of a court of equity under the circumstances as stated in the bill and as they actually were. The firm assets were utterly insufficient to pay firm debts. Before individual property could be resorted to by firm creditors, individual debts must be provided for. The unequal value of the individual estates, the fact that property of the deceased partner to the extent of \$53,000 was already pledged for firm debts, involved the necessity for an adjustment of matters between the estate of the deceased partner and

the surviving partners. In no other way could the firm assets be protected from seizure by execution and the sacrifice of value sure to follow.

But if the facts be regarded as substantially proving that the Vaccaros consented to the proceeding by agreeing to make no opposition, so that the proceeding could not be regarded as purely one *in invitum*, we are still of opinion that the appointment of a receiver under such a suit, and for the *bona fide* purpose of liquidating the affairs of a partnership dissolved by death, was not the making of a general assignment within the meaning of the bankrupt act. A general assignment is the voluntary act of the debtor, whereby he transfers his property to a trustee for the benefit of creditors. Its nature and characteristics were well understood. It is not enough to say that, if the same consequences ensue from the appointment of a receiver, the one act is the equivalent of the other in law. Under section 3 of the bankrupt act very serious consequences attach to the making of a "general assignment." The debtor may be ever so solvent, and the act highly advantageous to his creditors, still it is technically an act of bankruptcy, and some creditors are quite likely to imagine that some advantage will accrue by an adjudication in bankruptcy. We are not disposed to construe the provisions of subdivision 4 of section 3 as including anything as a general assignment unless it is clearly one of those assignments known to the common law as a general assignment. The mere fact that the consequences which attach to the appointment of a receiver for the purpose of winding up a partnership or a corporation are similar to those which result to creditors from a general assignment is not enough. If the procurement of the appointment of a receiver to wind up the affairs of an insolvent partnership be an act of bankruptcy at all, it must come under some other of the subdivisions of section 3. What we here decide is that it is not a "general assignment" under that section. The conclusion we reach is fully supported by the cases of *In re Empire Metallic Bedstead Co.* (D. C.), 95 Fed. 957, affirmed by the court of appeals for the Second Circuit in 39 C. C. A. 372, 98 Fed. 981, and the case of *In re Baker-Ricketson Co.* (D. C.), 97 Fed. 489. It is true that the cases cited involved corporations, and that in the case of the Empire Metallic Bedstead Company the receiver was appointed under a statute of New York providing for the dissolution and winding up of insolvent State corporations. So far as appears, however, the fact that the receiver was appointed under a State law was not regarded as of any moment, and was not the ground of the decision. In the case of the Baker-Ricketson Company no State law is referred to, and the facts are, in respect to the passive conduct of the corporation, substantially identical with those presented by this record.

2. It is next charged that the said surviving partners "while insolvent, permitted its property, viz. its stock of goods and merchandise,

to be removed and concealed with intent to hinder, delay, and defraud its creditors, in this: that on the 24th of August, 1899, said firm did permit its stock of merchandise to be transferred and removed to O. B. Polk, receiver." So far as this is intended to predicate an act of bankruptcy upon any conveyance, transfer, or removal made by the deed of the Vaccaros, it is not made out. They made no conveyance or transfer to the receiver. The first subdivision of section 3 discriminates between a conveyance or transfer made by the debtor and a concealment or removal "permitted" by him. A like discrimination between an act done and an act "suffered or permitted" is shown by subdivision 3 of section 3. If the debtor, while insolvent, "suffer or permit" a creditor to obtain a preference through legal proceedings, or if he "permit" his property to be "concealed or removed" with intent to hinder, delay, or defraud his creditor, he has committed an act of bankruptcy. But it is not declared to be an act of bankruptcy if he "permit" or "suffer" a receiver to be appointed for the general benefit of the creditors of a dissolved and insolvent partnership, and this is the most that can be said to be shown by the evidence in this case. Under the act of 1867 it was held to be an act of bankruptcy to permit the creation of a receivership. *In re Baker-Ricketson Co.* (D. C.), 97 Fed. 489, 491, and cases cited. But, as Judge Lowell observes in the case last cited, this ruling was based upon section 39 of that act, which made it an act of bankruptcy to "procure or suffer his property to be taken on legal process with intent to defeat or delay the operation of this act." Under that provision it was held that the appointment of a receiver was legal process. But this provision is not found in the act of 1898, and the language of section 3, subd. 1, is by no means the equivalent of that section. A like question arose in *Re Baker-Ricketson Co.*, cited above, and upon full consideration Judge Lowell held that the "failure to resist a bill for a receivership is not a conveyance or transfer of property by the debtor."¹ Neither has the clause touching a concealment or removal by permission any clear bearing upon the matter of the appointment of a receiver. It would be an abuse of language and a confusion of ideas to hold that the passive conduct of the Vaccaros in respect to the bill seeking a receiver was a concealment or removal with intent to hinder, defraud, or delay creditors.²

¹ *Davis v. Stevens*, 104 Fed. Rep. 235, *acc.*

In *Mather v. Coe*, 92 Fed. Rep. 333, the appointment of a receiver was not opposed by the defendants, and the receiver thereafter paid certain creditors who were entitled to priority under the law of the State though not by the bankruptcy law. It was held that the defendants had committed an act of bankruptcy in procuring or suffering a transfer which resulted in giving a preference. See also *Davis v. Stevens*, 104 Fed. Rep. 235, 241.

² A portion of the opinion is omitted in which it was held that a partnership was not insolvent within the meaning of the act when the partnership estate and the surplus of the estates of the living partners and of a deceased partner over and above their individual indebtedness exceeded the partnership indebtedness.

IN RE THE UNION PACIFIC RAILROAD COMPANY.

DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, 1874.

[Reported in 10 National Bankruptcy Register, 178.]

THE petitioner alleged that he was a creditor of the Union Pacific Railroad Company, a corporation created by an act of Congress, and having its domicile and usual place of business at Boston, in this district; that the petitioner was the owner of eight bonds of the company payable to bearer for one thousand dollars each, commonly known as income bonds, which were not secured by mortgage, and would be due on the 1st day of September next; that the defendant corporation was possessed of a railroad and of certain lands, easements, and other property, subject to certain mortgages, and being so possessed and being insolvent did, on the eighteenth day of December last, make a transfer and assignment of said railroad and other property to the Union Trust Company of New York, to secure sixteen millions of bonds which purported to be issued in discharge of and exchange for its antecedent liabilities, including said income bonds. A statement of the debts of the company, and the amount of annual interest thereon and of the earnings, was given in the petition to prove the insolvency of the defendants. The mortgage was averred to have been given with intent to delay, defraud, and hinder creditors including the petitioner, and to give a preference to some creditors over others, and to defeat the operation of the bankrupt act. A copy of the mortgage was annexed to one of the affidavits, and purported to transfer all the property of the company subject to existing mortgages for the payment or security of all the unsecured debts of the company, including the ten millions of income bonds.

The conveyance was made with the usual defeasance of a mortgage and conditioned for the payment of the bonds to be issued under it, with semi-annual interest, and with a provision for a sinking fund, and in trust for the uses and purpose, and upon the terms, conditions, and agreements therein set forth. One of the agreements was as follows: "And it is further covenanted and agreed that eleven millions one hundred and eleven thousand one hundred and eleven dollars of the bonds hereby intended to be secured, shall be reserved to be used at the times and in the manner determined by the vote of the directors of the company, in exchange for or the proceeds thereof to be used for the purchase or payment of the bonds known as the ten per cent income bonds, by the party of the first part; and the said bonds so reserved as aforesaid, or the proceeds thereof, or any part thereof, shall not, at any time or under any circumstances, be applied or appropriated to any other purpose than that hereinbefore declared, until the same shall have been fully redeemed or paid."

There was annexed to the same affidavit a copy of a circular issued by the defendant company to the holders of the income bonds, in which an offer was made to exchange said bonds for the new bonds, on certain terms, giving six new bonds for five old bonds to make up the difference in interest, the new bonds carrying a less rate of interest than the old, and this circular announced that the directors had already availed themselves of this offer to the extent of nearly three millions of bonds owned by them. A part of Section 8 of the act of Congress, approved March 3, 1873, c. 226, was cited in these words: "The books, records, and correspondence, and all other documents of the Union Pacific Railroad Company, shall at all times be open to the inspection of the Secretary of the Treasury, or such persons as he may designate for that purpose. The laws of the United States providing for proceedings in bankruptcy shall not be held to apply to said corporation. No dividend shall hereafter be made by said company but from the actual net earnings thereof, and no new stock shall be issued or mortgages or pledges made on the property or future earnings of the company without leave of Congress, except for the purpose of funding and securing the debt now existing or the renewals thereof." By consent of parties counsel were heard upon the question whether an order to show cause should issue, a question which is usually decided *ex parte*.

W. D. Shipman & E. L. Andrews, for the petitioners.

S. Bartlett and B. R. Curtis, for the defendants.

LOWELL, J. Two most important and interesting questions have been argued in this case. 1st. Whether the petition alleges an act of bankruptcy on the part of the defendant corporation? 2d. Whether the statute which exempts the defendant from the operation of the bankrupt act, is within the constitutional power of Congress to enact?

It is admitted to be the better opinion generally, and the settled law of this circuit, that a railroad corporation is liable to be made bankrupt; and within a month last past I have adjudged one to be so for preferences such as would have sufficed in the case of a natural person. So that, as I said before, the first question is whether, in making a mortgage of its franchise, lands, and other property to a trustee, for the equal security or payment of all its unsecured creditors, this company has committed a technical fraud within the 39th section of the bankrupt act.

A class of decisions has been referred to in argument as having a close resemblance to this case, in which it was held that a conveyance of all the property of a trader in trust to sell it and distribute the money to creditors proportionately, precisely as it must be divided in bankruptcy, is a technical fraud on the statute. The ablest writer upon the subject has expressed his surprise that this doctrine should ever have been adopted. "It is, however, difficult to understand," said Lord Henley, "how an assignment of the whole of a trader's property, though the direct and immediate object of it be for the payment

and benefit of all creditors, should have been deemed an act of bankruptcy, as done with an intent to defraud and delay creditors. This doctrine has occasionally met with his disapprobation, and the reasons upon which it is founded are by no means satisfactory." Henley (Eden) on Bankruptcy, 28. He admits that at the time he wrote (1832) the authorities were unanimous against his opinion, and there has been no change in the law since that time. I consider the better opinion under our bankrupt act to be the same, that it forbids such a distribution by means of a private trust created by the debtor, unless all his creditors consent.

Various reasons are given, the substance of which is, that if an estate is to be wound up by trustees, they should be appointed by, and be subject to, the order of the courts having jurisdiction of the subject-matter; and that the creditors should have a voice in their appointment. Putting a person into bankruptcy who has undertaken to have his affairs wound up in this way, is scarcely more than a specific performance of the trusts he has himself created. The decisions under the bankrupt act have not been uniform, but the prevailing doctrine agrees with the law of England. But this case does not come precisely within that range of decision, because we have not here a person admitting that his business must be wound up and his property be sold and divided, but one who undertakes to keep on, in his ordinary and proper business, and divide his earnings equally among all his creditors, with a security upon the principal for the fulfilment of that undertaking.

If the defendant were a trader, I should not doubt that a mortgage by which he secured his creditors the payment after a lapse of twenty years' time, of their debts now or soon coming due, would be an act of bankruptcy as delaying them under the guise of security. Stewart v. Moody, 1 Compt. M. & R. 777; *In re Chamberlain*, 3 N. B. R. 710.

But a carrier is not a trader, and this mortgage is not a mere trust to pay in twenty years. The undertaking of a trader who trades on credit undoubtedly is to sell his goods in season to meet the payments for their purchase, and if instead of doing so, he makes a trust for their payment at a later time, he has broken his engagement. It can hardly be said that a railroad company contracting a debt for building and equipping its road, undertakes to sell its franchise in season to pay that debt as it matures. Wisely or unwisely, it has been the policy of this country to encourage the building of these new highways by borrowed capital, and it is, I fear, true of a very large proportion of these corporations that they neither can nor are expected to pay such debts at maturity, excepting by negotiating a new mortgage; and if the very act of giving such a mortgage is a technical fraud on the statute, then all these companies are, or at a period already fixed will certainly be, bankrupt.

It was hardly a part of the understanding between this defendant and the purchasers of the income bonds that it must either pay them

at maturity or sell out its road and relinquish its enterprise, while a trader does, I apprehend, assume that very burden.

It has often been decided by juries, and even by courts, as matter of law, that a mortgage of a trader's whole stock in trade is a transaction out of the ordinary course of his business. But it has never been said, and cannot with truth be said, that a mortgage by a railroad company is an act of an unusual character. It would be out of the ordinary course of its business as a carrier of passengers and goods, but it must be admitted that as a mode of raising or renewing a part of its capital, it is of only too frequent occurrence, and is encouraged by legislation and the announced policy of the country. It is implied in the statute cited in this case, that this defendant may secure its outstanding debts in this mode.

Another difference between a mortgage of this kind and one in which an ordinary trader should postpone the payment of his debts, is this: The note or bond of a railroad company secured by mortgage, is a well known security which passes current in the market, and the full value of which, or what the general opinion fixes as its value, can always be obtained. Its creditors who are unsecured are offered a new bond which is secured, they are obtaining a security which is at least as valuable as what they already have; in other words they are not delayed, according to any ordinary view of the matter that would be likely to occur to a person dealing in such securities. This petitioner is not injured by being offered a security fully as valuable and as readily convertible into money as that which he already has, and if the law departs in this respect from the fact, it in so far contravenes the truth which is not to be presumed.

Another important point is that this mortgage does not merely offer to postpone the debt, but to give the long bond or the money instead thereof. This is plainly one of the trusts, and the trustee can be compelled to apply the new bonds in one or the other of these modes, to the satisfaction of the present creditors. The argument that this is not the purport of the mortgage seems to me wholly unfounded. If the bonds were at par, it is plain that no possible injury could be done to any creditor, because he might take the money if he did not like the bond. The plaintiff argues that he is entitled to prove that these bonds are not at par, and that they will probably not be so in September next, when his debt will mature, and if not then he must be content with something less than his debts, to wit, an equal dividend with the other creditors, of what the bonds will produce, and that, he says, is bankruptcy. I think there is some evidence in the mortgage itself that the defendant is not now and will not be likely soon to be in a position to pay these petitioners and its other unsecured creditors in full: and then the question is whether it is an act of bankruptcy in an insolvent railroad company, or one likely to become so, to make a mortgage to raise money for the equal benefit of its creditors.

It is often said that an insolvent person has but two lawful courses

open to him, — to compromise with his creditors with the assent of every one of them, or to go into bankruptcy.

But this is too broad a statement. We are admonished by a late decision of the Supreme Court that there is at least one other, namely, to remain entirely passive and permit his creditors to make what they can out of his property by legal process independent of bankruptcy. *Wilson v. City Bank of St. Paul*, 9 N. B. R. 97. And this is what the plaintiff says that defendant should do. The true explanation of *Wilson v. The City Bank of St. Paul*, *ubi supra*, is that an insolvent trader may intend, and expect, and hope to recover his position and continue his trade, and therefore his failing to go into bankruptcy when his property is attached, does not lead to the inference that he intends to prefer the attaching creditor. Indeed, the decision arrived at rests upon the proposition that an insolvent person is under no legal obligation to go into bankruptcy under any circumstances. I must not be understood as criticising in a hostile sense a decision of the Supreme Court, which I believe to be a perfectly sound interpretation of the existing bankrupt law. I am merely pointing out its true scope. The only general proposition that can be laid down is one which I mentioned before, that one who is not only insolvent but who undertakes to make a final distribution of his assets, must do it through the bankrupt court.

If then, the defendants, though technically insolvent, are not bound to go into bankruptcy, and not undertake to make a distribution of their assets, are they bound to wait until these millions of income bonds mature, and then submit themselves to such processes of attachments and others as the law may give to those of their creditors who choose to avail themselves of these remedies? Or can they mortgage their property in good faith to raise the money necessary to pay more debts, or so much of them *pro rata* as their property will bring in the market?

So far as I know it has always been held that even a trader may mortgage his property for present value if there be no actual fraud. At common law a mortgage of goods necessarily delays creditors, because the goods cannot be taken in execution while the mortgage remains unpaid; and yet it is the law that a mortgage given for the honest purpose of relief, however inadequate the relief may be, that is to say, though the whole stock be mortgaged for a small advance, and however certain it may be that creditors will be delayed in levying their executions, will not be considered to be given with intent to delay them, the intent being really wanting. "It has been held," said Cockburn, C. J., delivering the opinion of the Court of Exchequer Chamber, "that when a trader assigns his whole property, but receives in return a fair equivalent, the transaction is not void under the bankrupt law." *Mercer v. Peterson*, L. R. 3 Exch. 106, affirming the decision of the Exchequer. In that case the whole was assigned for a return of about one-half. And it is obvious from the remarks of the judges that such

an incumbrance would tend to delay half the creditors, but it was supported as being done in good faith and for present value with intent to continue the trade. (See Robson on Bankruptcy.) American cases to the same effect are *Darby's Trustees v. Boatman's Savings Institution*, 4 N. B. R. 600; *Darby v. Lucas*, 1 Dill. 164, affirmed; *Tiffany v. Lucas*, 8 N. B. R. 49.

I understand the argument of the plaintiff to admit the soundness of these decisions, and to concede that a mortgage for money is always valid unless there were some intent to use the money fraudulently, and he does not contend that any such intent is proved or alleged in this case, but he does insist that he does not wish to take the bonds, and that those who do consent to take them will immediately become preferred creditors. This argument was repeated in various forms and dwelt upon with much earnestness, but I cannot admit its force.

It is a new idea of preference that a security can be a fraudulent preference to some creditors which is offered equally to all. The very fundamental conception of preference is inequality, and this is equality. The creditors might perhaps have some reason to complain if the option were not given them, but that they can have any ground to object to the alternative can never be granted.

It may be said that such a mortgage differs only in form from a sale of the whole property, with the intent to divide the proceeds among the creditors, instead of applying to the bankrupt court for that purpose. The difference is not great, but there is the point of distinction already mentioned, that the sale of a railroad would be a confession of the necessity of breaking up the business, while a mortgage does not carry with it that admission. Besides, although, as we have seen, a trust for sale and distribution by a sort of private bankruptcy, has been held by a preponderance of authority to be illegal, an outright sale for cash has never been so regarded, even in the case of a trader, unless he intended to commit some actual fraud or some fraud on the bankrupt act, with the proceeds.

A sale is mentioned in the statutes as one made in which fraud may be committed, and sales as well as mortgages have been set aside. See *Walbrun v. Babbitt*, 9 N. B. R. 1. I have set aside several sales and mortgages. But sales and mortgages for cash paid down have been uniformly upheld, in the absence of an actual intent to commit a fraud or preference with the money so obtained; and there is no case in which the intent to keep the money in full reach of creditors, instead of the property, or even to divide it ratably among them, has been held to be such a fraud. There is one case in Massachusetts, in which it was decided that when an insolvent person converted his assets into money, and offered to pay all his creditors *pro rata*, he had committed a fraud upon the act as against a creditor who had refused to receive his share. *Fernald v. Gay*, 12 Cush. 596. But that case was decided under St. 1844, c. 178, sect. 8, which provided that no discharge should be granted "if the debtor hereafter, when insolvent,

shall within one year next before the filing of the petition by or against him, pay or secure, either directly or indirectly, in whole or in part, any borrowed money, or pre-existing debt," and of course the case came within the very words of that statute. It was not a decision upon the subject of preferences generally, nor is that word mentioned in the section, nor is there such a word as "intent" in that law. In my judgment it would not be a preference, under the bankrupt act, to pay several creditors sums which the debtor was able and willing to pay to all; though I do not mean to say that he must not be always ready (*tout temps prest*) to pay to all their equal share.

While, therefore, I find it to be settled by a preponderance of authority, though against some weighty opinions, that a trust to sell all a debtor's property and divide the cash ratably among his creditors is an act of bankruptcy; I do not find it to be settled that a sale by the debtor himself for cash with intent so to divide it, is such an act, much less that a mortgage by a railroad company to secure all its creditors equally out of its earnings, or to pay such as refuse the security their ratable proportion of the proceeds, is an act of bankruptcy. D

My opinion upon the first question renders it unnecessary that I should decide the still more interesting one of the constitutionality of the statute which undertakes to except this corporation out of the general law. If supported, it must be, I think, upon the ground of a right in Congress to modify the charter of the company to that extent.

Order to show cause refused.¹

IN RE GUTWILLIG.

CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT,
JANUARY 25, 1899.

[Reported in 92 Federal Reporter, 337.]

IN bankruptcy. Petition to review an order of the District Court of the United States for the Southern District of New York.

In this case, a petition in involuntary bankruptcy having been filed against a debtor who had previously made a general assignment for the benefit of his creditors, the District Court, on motion of the petitioning creditors, granted a restraining order forbidding the assignee to dispose of the assigned property or its proceeds until the adjudication upon the petition. 90 Fed. 475. And thereupon the assignee brought this petition for review of such order.

George Fielder, for petition.

Stillman F. Kneeland, for respondent.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

¹ See *Rumsey v. Novelty, &c. Co.*, 99 Fed. Rep. 699.

WALLACE, Circuit Judge. If the general assignment made by the alleged bankrupt would, in the event of an adjudication of bankruptcy, be treated as void as against the trustee of his estate, the order enjoining the assignee from disposing of or interfering with the property transferred pending the hearing was a proper and expedient exertion of the authority conferred upon courts of bankruptcy by clause 15, section 2, of the present act.

The assignment, which was made November 9, 1898, recites the insolvency of the assignor, and transfers all his property and effects to an assignee for the benefit of creditors, upon the trusts to convert the same into money, and, after paying the expenses of executing the trust, to pay all creditors of the assignor ratably, and in proportion to their several demands.

It is insisted for the appellant that whenever the question arises the assignment must be determined to be valid, because it was without preferences, and does not appear to have been made with any actual intent by the insolvent debtor to defraud his creditors. This contention rests upon the terms of that section of the act which enumerates what transfers of property by a person who afterwards becomes a bankrupt, and what liens upon such property are void, as against the trustees of the estate. Section 67. The section declares, among other things, that "all conveyances, transfers, assignments, or encumbrances of his property" made or given by a person adjudged a bankrupt within four months prior to the filing of the petition "with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against his creditors, except as to purchasers in good faith and for a present fair consideration," and all property transferred and incumbered "as aforesaid" shall remain a part of his estate, and pass to the trustee.

We entertain no doubt that a voluntary general assignment, with or without preferences, made by an insolvent debtor within the prescribed four months, is fraudulent, and intended by him to "hinder, delay, and defraud" creditors, within the meaning of the section, because its necessary effect is to defeat the operation of the bankrupt act and the rights of the creditors to such an administration of the assets as that act is intended to provide. The reasons for this conclusion, and the authorities in support of it, are so fully and satisfactorily set forth in the opinion of Judge Brown in the court below that we do not deem it necessary to enlarge upon them. They are summarized in the following extract from his opinion: —

"Since the time of George II., and even prior, the current of English adjudications, followed by our own, has been that a voluntary assignment of all his property by an insolvent debtor to an assignee of his own choosing, though without preferences, is itself an act of bankruptcy, a fraud upon the act, and hence a fraud upon the creditors, as respects their rights in bankruptcy, and voidable at the trustee's option, even without an express provision to that effect in the statute."

The citations referred to by him amply sustain the general proposition. Among the most instructive are *Barnes v. Rettew*, 2 Fed. Cas. 868, and *Globe Ins. Co. v. Cleveland Ins. Co.*, 10 Fed. Cas. 488.

The general purpose of bankrupt laws, and of the present act, is not only to administer the assets of insolvent debtors on the basis of equality, but to secure that result by giving to the creditors, and not to the debtor, the selection of the person to be intrusted with the administration. To permit the administration to be committed by an insolvent debtor, who is on the heels of an adjudication of bankruptcy, to a trustee selected by himself, and thus be wholly withdrawn from the supervision of the bankrupt court, is irreconcilable with any reasonable view of the purpose of such legislation. Hence it has been almost uniformly adjudged that any disposition of his property by a debtor intended to accomplish that purpose is a fraud upon the creditors, who have a right to invoke its protection. That such disposition is not one which is fraudulent at common law is immaterial. It suffices if its necessary effect is to defraud, hinder, or delay creditors in their rights and remedies under the bankrupt law.

By the laws of New York and of many of the other States, general assignments by insolvent debtors for the benefit of creditors, if free from actual fraud, are valid, notwithstanding they create preferences between creditors; and, if the contention urged upon this appeal is sound, such assignments, as well as those which are made to distribute the debtor's property ratably, are, by the terms of the section, good against the trustee in bankruptcy. The language applies unequivocally to all transfers or assignments, and declares those only null and void which are made with the intent and purpose to hinder, delay, or defraud creditors, and places an assignment with preferences on the same footing as one without, because it makes no distinction between them. The language also includes, not only assignments of every kind, but every kind of transfer or conveyance by which a debtor may elect to secure a creditor in preference to or exclusion of his other creditors. If it is the meaning of the section to permit preferences by assignments or other conveyances if they are not fraudulent at common law, an anomaly has been introduced into the present act not found in any bankrupt law hitherto enacted in this country or England; and it exists in an act, and in the very section of the act, which nullifies preferences obtained by legal proceedings. It is impossible to believe that Congress, while precluding a creditor from obtaining preferences over other creditors by legal proceedings, however regularly and fairly employed, should have intended to permit the debtor to select one or more favored creditors, and give him or them preference by his voluntary act. The section annuls "all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him," and any "lien created by, or obtained in, or pursuant to any suit at law or in equity . . . begun against a person

within four months before the filing of a petition in bankruptcy by or against such person . . . (1) if it appears that said lien was obtained or permitted while the defendant was insolvent, and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act, . . . provided that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause of inquiry."

These provisions manifest unmistakably the intention of Congress not only not to permit preferences to be acquired upon the bankruptcy of a debtor when he is about to become a bankrupt, but also to annul all dispositions of his property, except to innocent purchasers, which will defeat the rights of creditors to a distribution by the instrumentalities and according to the scheme of the bankrupt act. The purchaser of a title under a lien acquired by legal process is not protected, unless he took it without notice of its preferential origin. The purchaser under a voluntary conveyance must not only be a purchaser in good faith, but he must be one who has subtracted nothing essentially from the value of the debtor's assets. They are wholly inconsistent with an interpretation of the clause annulling voluntary conveyances which will permit such conveyances to stand when intended to defeat the operation of the bankrupt act. This clause must be interpreted in a sense which harmonizes with the general intent of the section as gathered from the other clauses; and, thus read, it annuls any conveyance made to impair or defeat the remedy of creditors under the bankrupt act, unless made to a purchaser not in complicity with the insolvent, and for a "present fair consideration."

*The order of the District Court is affirmed, with costs.*¹

¹ *Re Curtis*, 91 Fed. Rep. 737 (see s. c. on app., 94 Fed. Rep. 630); *Re Sievers*, 91 Fed. Rep. 366; *Davis v. Bohle*, 92 Fed. Rep. 325 (C. C. A.); *Leidigh Carriage Co. v. Stengel*, 95 Fed. Rep. 637 (C. C. A.); *Matter of Gray*, 47 N. Y. App. Div. 554, *acc.* See also *Re Abraham*, 93 Fed. Rep. 767; *Re Scholtz*, 106 Fed. Rep. 834.

CHAPTER V.

WHAT PROPERTY PASSES TO THE TRUSTEE.

SECTION I

TIME OF THE TRANSFER.

IN RE ANNIE DE ETTA PEASE.

Sumit
DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK,
OCTOBER, 1900.

[Reported in 4 American Bankruptcy Reports, 578.]

THE bankrupt, up to November 22, 1899, was doing business at Buffalo, N. Y., under the name of the F. S. Pease Oil Company. On that day the sheriff took possession of her store on executions, and continued in possession until the appointment of a trustee in bankruptcy on February 16, 1900. Certain creditors filed a petition in bankruptcy on December 15, 1899. An adijudication of bankruptcy followed on January 8, 1900. Delays incident to negotiations toward a settlement satisfactory to all creditors delayed the appointment of a trustee until February 16, 1900.

Meanwhile the alleged bankrupt continued business as before, filling orders, as she claims, by purchase of goods outside, and receiving payments on account of goods sold previous to the filing of the petition, as well as in the interval between that date and the dates of the adjudication and the appointment of the trustee, all charges for goods sold and credits for moneys received being entered in her books without opening new accounts or in any other way recognizing the changed condition of affairs. She gave as a reason for this that she expected to settle with her creditors and to resume business through a composition or payment in full, and thus sought to keep the business alive.

On this state of facts the trustee brings the bankrupt in on an order to show cause why she should not turn over the moneys collected by her subsequent to the date of filing the petition, December 15, 1899, for goods sold by her prior to January 8, 1900, the date of adjudication. The trustee concedes that he has no claim for moneys received for sales after the adjudication, the sheriff having been in possession until the trustee relieved him, and the stock thus continuing intact; the bankrupt admits that she must account for moneys received for sales prior to the filing of the petition, provided they were from her.

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2 HOTCHKISS, referee. The only question of law to be determined here is: Under section 70a, what vested in the trustee in bankruptcy, — that which the bankrupt had on the day the proceedings were begun by the filing of the petition, or that which she had on the day she was adjudged a bankrupt? Were this a voluntary case, the question would be unimportant. In involuntary cases, however, there is of necessity an interregnum of from three weeks upward; in this case the two dates are, December 15, 1899, and January 8, 1900. The bankrupt here also insists that, even if the trustee's contention that his title relates back only to the adjudication is true, she is still entitled to retain her collections for goods sold since December 15, 1899, — nay, since November 22, 1899, the day the sheriff took possession, — for the reason that she can show that all of such sales were of goods purchased from other dealers, and not from her stock. But the legal question is raised preliminary to such proof, for the purpose of limiting the testimony if possible. It is also urged that, even if her sales subsequent to the sheriff's possession were of goods purchased elsewhere, her creditors are entitled to the profits thereon during the interregnum, — that is, up to the date of the adjudication, — and that for these she must be ordered to account.

This question seems to have been up but once before, and then in a form not entirely alike or necessarily controlling on the decision here. *In re Harris*, 2 Am. B. R. 360. The trustee relies on several cases as supporting his contention that the date of adjudication, not the day when the proceedings were commenced, is the day of cleavage. *In re Gutwillig*, 90 Fed. 481; *Carter v. Hobbs*, 92 Fed. 599; *In re Abraham*, 93 Fed. 779. To these might be added *In re Clute*, 1 N. B. N. 386; 2 Am. B. R. 376, *In re Becker*, 2 N. B. N. 24, 3 Am. B. R. 412. In none of these cases, however, is the exact point at issue, nor do the opinions go further than quote one or both of the seemingly contradictory phrases in section 70a.

In but two cases is there even a hint as to what the judge writing the opinion really thought: (1) Judge Baker, in *Keegan v. King*, 96 Fed. Rep. 758, says: "After an adjudication of bankruptcy has been made, the title to all of the property of the bankrupt, as of that date, passes to the person who is subsequently chosen trustee," thus seemingly hinting toward the contention of the trustee here; (2) while in *In re Yukon Woolen Co.*, 96 Fed. Rep. 326, Judge Townsend, in discussing section 70a, quite clearly implies that the words "shall be vested by operation of law with the title of the bankrupt as of the date of the adjudication," refer to time merely, while the apparently contradictory words in the subsequent clause, "property which, prior to the filing of the petition, he could by any means have transferred," etc. (section 70a (5)), refer to what title passes, rather than the time of vesting.

There was no such difficulty under the law of 1867. By section 14 of that statute the assignee's title vested by relation as of the date the

proceedings were commenced. As a result, a merchant against whom a petition in bankruptcy was pending could not do business, the title being in the air until adjudication or dismissal. There seems little doubt that the insertion of the words "as of the date of the adjudication" in the present law was intended to meet the difficulty. Collier on Bankruptcy, p. 405; Analysis of Torrey Bankrupt Bill, Senate Bill 1035, 55th Congress, p. 76. Two of the text-book writers incline to the belief that as to title a new day of cleavage has been established. Compare Bush on Bankruptcy, p. 385; Loveland on Bankruptcy, pp. 284, 327. Mr. Brandenburg is noncommittal, merely quoting the law (p. 414);¹ while Mr. Collier (pp. 405, 406) and Mr. Lowell (p. 508) incline to the belief, to put it tersely, that the words "prior to the filing of the petition" refer to what passes, and the seemingly antagonistic words earlier in the section refer only to when it passes.

This latter view seems the more reasonable. It meets the difficulty complained of under the law of 1867, and applies to business the doctrine that the debtor is innocent of bankruptcy until proven guilty. It protects *ad interim* purchasers and keeps going concerns alive, for the benefit of the creditors if adjudications follow, and the benefit of the debtors themselves if dismissals result. Nor can it be said that, by recognizing a valid title in the bankrupt until adjudication, creditors may be at the mercy of a dishonest debtor. Congress, foreseeing that, also enacted section 69, by which creditors may take possession of the property of debtors likely to take advantage of the situation, a privilege emphasized by the almost identical words of section 3e.

This view also comports with well-established principles of bankruptcy legislation in the United States. Our policy has been to establish a day of cleavage,—that is, a day before which the relation of debtor and creditor exists, but after which, at the debtor's option, it ceases; a day before which all the debtor has becomes his creditors, but after which that which he acquires is his, subject only to his new trusteeship to new creditors. With us that day has always been the day proceedings are commenced, and the present law repeatedly recognizes it. Compare sections 1 (10), 3b, 6, 9b, 11a, 29b (4), 60b, 63a (1), (2), (3), (5), 64b (4), 67c-e-f, 68b. Where a point of time is indicated by the words "the date of the adjudication," the impracticability of using the other date is apparent. Compare sections 7 (8), 14a, 55a, 65a, and even 70a, as previously explained.

The English Bankruptcy Act distinguishes sharply between the time of vesting and the property which vests. Section 54 vests the title in the trustee "immediately on a debtor being adjudged bankrupt." But by section 44 the property divisible among the creditors is defined as "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge;" while by section 43 "the commencement of the bankruptcy" is defined as the day on which the voluntary peti-

¹ In his second edition the doctrine of *Re Pease* is stated as representing the law.

tion is filed, or, if involuntary, the day on which the first act of bankruptcy (not earlier than three months prior) relied on was committed. In other words, in England, while the title vests on the date of the adjudication, it may relate backward to three months before the petition, and may also include everything acquired before the discharge. It is a little difficult to understand the justice of this, especially as by sections 30 and 37 of the same act a discharge operates only on debts existent or obligations created prior to the date of the "receiving order," i. e., in actual practice the date of filing the petition. In other words, it would seem that in England creditors may share in after-acquisitions prior to the discharge, though their debts post-date the beginning of the proceeding, and yet, if not paid in full, still have undischarged debts for the debtor.¹ But the point to which attention is called is that, in spite of this period of probation, during which the English bankrupt must continue to surrender all that he may acquire, the English law, like ours, and probably for the same reason, distinguishes between the time of vesting and the title which vests, and further fixes the time on the day we fix it.²

¹ This is an error. Section 30 (2) provides that a discharge "shall release the bankrupt from all other debts provable in bankruptcy." The exceptions stated are debts due the crown, created by fraud, etc. By section 37 (3) debts "to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy." A creditor whose debt is incurred after the receiving order, therefore, cannot prove his debt; and as the property acquired by the bankrupt up to the time of his discharge passes to his assignees (*Re Roberts*, [1900] 1 Q. B. 122), such a creditor cannot share in any property until after the discharge.

² The sections of the English Bankruptcy Act of 1863 in regard to the transfer of the bankrupt's property are as follows:—

43. The bankruptcy of a debtor, whether the same takes place on the debtor's own petition or upon that of a creditor or creditors, shall be deemed to have relation back to, and to commence at, the time of the act of bankruptcy being committed on which a receiving order is made against him, or, if the bankrupt is proved to have committed more acts of bankruptcy than one, to have relation back to, and to commence at, the time of the first of the acts of bankruptcy proved to have been committed by the bankrupt within three months next preceding the date of the presentation of the bankruptcy petition; but no bankruptcy petition, receiving order, or adjudication shall be rendered invalid by reason of any act of bankruptcy anterior to the debt of the petitioning creditor.

44. The property of the bankrupt divisible amongst his creditors, and in this act referred to as the property of the bankrupt, shall not comprise the following particulars:

- (1) Property held by the bankrupt on trust for any other person.
- (2) The tools (if any) of his trade and the necessary wearing apparel and bedding of himself, his wife and children, to a value inclusive of tools and apparel and bedding, not exceeding twenty pounds in the whole.

But it shall comprise the following particulars:

- (i) All such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge; and,
- (ii) The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt

I am satisfied, therefore, that, though the words are confusing, Congress has accomplished what it intended, namely, that for the protection of these who deal with the bankrupt in the interval between the filing of the petition and the adjudication, he shall have a title capable of transfer; but that the day of cleavage, both as to provable and dischargeable debts, and as to property with which to pay these debts, is the day when the petition is filed. The other view would mark an innovation contrary to settled principles in this country neither intended by Congress nor warranted by the words of the statute.

for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice; and,

(iii) All goods being, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt, in his trade or business, by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof; provided that things in action other than debts due or growing due to the bankrupt in the course of his trade or business shall not be deemed goods within the meaning of this section.

45. (1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.

(2) For the purposes of this Act, an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver.

47. [See *ante*, p. 200, n. 1.]

48. Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy.

(2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt.

49. Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing in this Act shall invalidate, in the case of a bankruptcy —

- (a) Any payment by the bankrupt to any of his creditors,
- (b) Any payment or delivery to the bankrupt,
- (c) Any conveyance or assignment by the bankrupt for valuable consideration,
- (d) Any contract, dealing, or transaction by or with the bankrupt for valuable consideration,

Provided that both the following conditions are complied with, namely —

(1) The payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case may be, takes place before the date of the receiving order; and

(2) The person (other than the debtor) to, by, or with whom the payment, delivery, conveyance, assignment, contract, dealing, or transaction was made, executed or entered into, has not, at the time of the payment, delivery, conveyance, assignment, contract, dealing, or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time.

It follows, therefore, that the bankrupt need account only for moneys received by her for goods sold from her stock as it existed on the day the petition was filed; that all collections for goods purchased by her elsewhere, whether received by her or by the trustee, are her property; that the profits on any such goods so purchased and sold before the petition should be turned over to the trustee; and that any subsequent profits are hers, and not her creditors.

Evidence may be offered by both parties in accordance with the views here expressed, and the determination of the exact amount for which the bankrupt is accountable will be announced when the case is closed.¹

CLARKE v. MINOT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH TERM, 1842.

[Reported in 4 Metcalf, 346.]

ASSUMPSIT to recover \$1,729.02.

The parties submitted the case to the court on the following facts: The defendants are executors of the last will of Mary Ann May, who, by said will, directed them to pay \$2,000 to Abby Alcott, upon the death of Joseph May. The plaintiff is assignee of the estate of Amos B. Alcott, the husband of said Abby, under St. 1838, c. 163.

The estate of said Amos B. was assigned to the plaintiff by the judge of probate for the county of Middlesex, under the following circumstances: After the decease of the above-named Joseph May, the amount of said legacy was attached in the hands of the defendants, by a trustee process in favor of a creditor of said Amos B. Alcott, in an action founded upon a demand which was, in its nature, provable against the estate of an insolvent debtor, under the said statute. Said process was returnable and returned to the Court of Common Pleas for the county of Suffolk, at April term, 1841. The present defendants charged themselves, by their answers in said process, as trustees of said Alcott, by reason of said legacy, and final judgment was rendered therein against said Alcott, as principal, and these defendants, as his trustees, for the sum of \$1,704.42, and costs, on the afternoon of April 28, 1841, being three days before the last day of said term. The said attachment was never dissolved by said Alcott.

After said final judgment was rendered, and on the same day, viz., April 28, 1841, other creditors of said Alcott preferred a petition to the said judge of probate, setting forth the foregoing facts, and praying that proceedings might be instituted, under said statute, for dividing

¹ *Re Burka*, 104 Fed. Rep. 326; *Re Harris*, 2 A. B. R. 359, *acc.*

See also *Re Barrow*, 98 Fed. Rep. 582; *Re Stoner*, 105 Fed. Rep. 752; *Re Freeman*, 2 N. B. N. 569.

and distributing said Alcott's estate among his creditors. A warrant was issued to a messenger, by said judge, on the same day, directing him to take possession of said estate, and "forthwith to give public notice, and also to said Alcott's trustees before named," [the defendants] "that a warrant" had issued against his estate, etc., by advertisement thereof, to be published in the Boston Daily Advertiser, a newspaper printed in Boston, three weeks successively, etc. The messenger gave written notice to each of the defendants personally, before nine o'clock in the morning of April 29, 1841, and within twenty-four hours after the rendition of the judgment aforesaid; and before any execution had issued thereon, and caused the notification to be published in said newspaper, as directed in the warrant, on the morning of April 30. In the afternoon of April 29, execution in said suit against said Alcott, and the defendants, as his trustees, was issued, and the defendants paid to the officer the said sum of \$1,729.02, the amount which is claimed of them in this action.

(Several other facts, which related to the regularity of the proceedings of the judge of probate, etc., were also stated; but as it became unnecessary for the court to decide the questions arising from those facts, they are not here inserted.)

The parties agreed that "if it is competent in law for the defendants to give in evidence the foregoing facts, or any part thereof; and if, under the facts which may be so given in evidence, the court should be of opinion that the said attachment was not dissolved, and the payment by the defendants, on execution, as above stated, was proper; the plaintiff shall become nonsuit: Otherwise, judgment is to be rendered against the defendants for the sum of \$1,729, and costs."

M. S. Clarke, pro se.

W. Minot, for the defendants.

SHAW, C. J. Several questions have been argued in this case, which it is not necessary to decide. The question is, whether at the time when the assignment to the plaintiff, of the effects of the insolvent, under St. 1838, c. 163, took effect, so as to transfer his property and choses in action, the debt and sum of money, in the hands of the defendants, had been so taken on execution, that the assignment did not transfer it; or whether it was merely attached upon mesne process, so that the insolvent proceedings dissolved the attachment and left the debt to pass to the assignee, for the general benefit of the creditors.

This question depends upon the provisions of the insolvent law, determining the time at which the assignment shall take effect, so as to divest the property of the insolvent, in his real and personal estate and choses in action, and vest the same in the assignee. This clearly is not the time of the act of assignment, for that is always some time after the commencement of the proceedings; and by the terms of the statute, it relates back to an anterior period. One other consideration must be obvious; which is, that the judge, by such assignment, merely executes a power devolved by law upon him; he conveys no interest of his own;

the property which passes by it is transferred by force of the statute; and therefore the legal effect of such transfer depends little upon the terms of the assignment, either as to the property transferred, or the time at which it shall take effect. But the legal effect and operation of the assignment, in these respects, must depend upon the provisions of the statute. It is purely a statute title under which an assignee claims either the goods or choses in action of the insolvent; and to the statute we must look for the nature and extent of that title.

The question then recurs, to what time does this assignment relate back? The statute, section 5, thus states it: "Which assignment shall vest in the assignees all the property of the debtor, both real and personal, which he could by any way or means have lawfully sold, assigned or conveyed, or which might have been taken on execution on any judgment against him, at the time of the first publication of the notice of issuing the above-mentioned warrant." This leads directly to the inquiry, what is the time of the first publication thus referred to, and for this we go to the second section. The first section having provided for the issuing of a warrant to a messenger to take possession, etc., the second section provides as follows: "The said messenger shall forthwith give public notice, by advertisement, in such newspapers as shall be designated by the judge, and also such personal or other notice to any persons concerned, as the judge shall prescribe."

It seems to have been the obvious policy of the statute, to fix some precise point of time, at which the whole property and effects of the debtor shall be deemed to have passed from him, and vested in the assignees. The legislature appear to have intended that a time should be fixed, before which all transfers and conveyances of property by the debtor, made in good faith, and not intended to give preferences, shall be valid; so of all payments in the ordinary course of business, and transfers of property, made without the concurrence of the owner, as by seizure, or levy on execution.

Q The same time is fixed on for another purpose, in this statute, by section 8, which determines what debts may be proved; and it provides, that "all debts due and payable from such debtor, at the time of the first publication of the notice of issuing the said warrant, may be proved." It only remains then to ascertain what specific act was intended by these words, "the first publication." The statute having previously directed that public notice should forthwith be given by advertisement in such newspapers, etc., the natural, and, in our opinion, the legal construction is, that it is such notice by advertisement. *A* Whether such notice may be considered as made public by advertisement, when the advertisement, duly signed, is delivered to the printer at the office of publication, with orders to print it in the next paper, or by putting it in type and striking it off on paper, or by the first delivery of one of the newspapers containing it, it is not necessary in this case to decide; nor, if the latter is required, is it necessary now to decide, whether the publication must await the regular day of publication of

the newspaper, or whether it would be a publication by advertisement, within the statute, to anticipate the day of publication, by striking off, issuing and distributing, an extra number of such newspaper. These points are not necessary to the present case, because there is no intimation that there was any publication by advertisement, before the defendants, as trustees, paid over the amount in their hands, on execution; but, on the contrary, the personal notice given to them, before such payment, is relied upon to show that they paid in their own wrong.

Two grounds are relied upon, in the ingenious argument of the plaintiff, to show that such personal notice is sufficient, in a case like the present. The first is, that as the whole subject of the mode of notice is to be directed by the judge and stated in the warrant — personal notice to certain persons named, and advertisements in certain newspapers designated — the duty of giving notice is but one duty, though consisting of several acts, and that the first act done in the performance of this duty — the whole being followed up and done with reasonable diligence — is the first publication. But this seems inconsistent with the terms of the statute: "The messenger shall give public notice by advertisement, and also such personal or other notice," etc. Such personal notice may be private and confidential, and confined to the persons named. Public notice and personal notice, instead of being the same thing, are plainly put in contradistinction to each other. To hold that personal notice to an individual, perhaps one having an interest to conceal it, is a publication of notice, would be putting a construction upon the language, not conformable to its usual meaning; especially when the statute has directed two forms of notice, one of which is to be public.

But such construction seems equally inconsistent with the policy of the statute. We are now seeking to ascertain and fix the point of time intended by the statute as the time at which all the property of the debtor is changed and his power over it suspended; that point, in other words, prior to which all payments, made by him or to him, all conveyances (not fraudulent) made by him, all seizures, levies, and extents of execution upon his property, shall be held valid, and all those, made after, void. It was competent for the legislature to have fixed any other time, as, for instance, the application to the judge, or the act of the judge in issuing the warrant, or the delivery of the warrant to the messenger. Either of these would have afforded security to the creditors, but might have unjustly interfered with the rights of those who had been dealing with the debtor, in good faith and without notice. The time of first publication was fixed, obviously because that act would, in most cases, afford actual notice to those immediately interested; and it was intended as constructive notice to all. But no such effect can be attributed to personal notice to one individual.

The other, and we believe the principal ground relied on by the plaintiff, is, that although the time of notice to the defendants was not

the time at which all the estate and effects of the debtor vested in the assignee, yet that it bound the property in the defendants' hands, and prevented them from parting with it by paying it on an execution against the debtor. The first serious objection to this view is, that instead of fixing one point of time, at which all the property passes, it may fix various times, according as certain individuals had notice or not. On the same execution, for instance, some trustees might have notice, and others not. According to the principle contended for, some would be bound to pay over, and others prohibited. Besides, to whom shall personal notice be given, to have the supposed effect? The defendants were mere stakeholders; they were to pay over to any person lawfully entitled. If the officer had no notice of the warrant, and more especially if the creditor, for whom he acted, had none, how was notice to the mere holder of the property to affect their rights? Suppose the property in the hands of the trustees had been chattels, to be sold on execution instead of money, would they not have been bound to expose them? And if they had so exposed them, might not the officer have lawfully taken them?

But it is further insisted, as a general rule of law, that when constructive notice is prescribed by statute, in order to give full effect to conveyances, if actual and express notice is shown, as to any individual, it supersedes the necessity of showing such constructive notice in regard to him. This brings us in fact to the precise point of the case. What property passed by this assignment? The answer is, all that the debtor had at the time of the first publication of notice. But if it had been rightfully paid away, transferred, or taken in execution, before that time, then it was not his, and the assignment did not reach it. The notice that the defendants had was not that an act had been done which transferred the property from the debtor, and which only required publication to give it effect, but that proceedings had been commenced which, if followed by a publication of notice and other acts, would transfer the property. This is not the notice contemplated by the rule. The most familiar case is that of the registration of a deed, which is made necessary to secure the estate from being attached as the property of the grantor. But if an attaching creditor has notice that his debtor has conveyed his estate, though the deed is not registered, still he is bound by his actual notice. The reason is that, as between the grantor and grantee, the property has actually passed by the execution and delivery of the deed, and actual notice to him is equivalent to that registration, the purpose of which was to give him notice. But the fact of which he has notice, in such case, is that the estate has been actually conveyed. Notice that another is about to obtain a deed, though it is actually obtained, but not registered, before his attachment, does not defeat his attachment. Cushing v. Hurd, 4 Pick. 253. If the law were that a deed should have no effect to transfer estate till in fact registered, then notice of an unregistered deed would not prevent another from attaching. The only difference between

~~that and the present case is this: that would have a prospective, and this has a retrospective relation.~~ The distinction between this and most of the cases cited, is that in them registration or publication is required merely for the purpose of giving notice of an act which, of itself, transfers or affects property. In this case, the publication is necessary to fix a point of time at which the deed shall take effect, and without which the deed is inoperative. Suppose a debtor should happen to be so situated that he has only five debtors and five creditors, and personal notice is given to all of them, and no public notice is ever given, could it be maintained that the mere official assignment under this statute would pass the property of the debtor to the assignee, and enable the latter to sue in his own name, and perform all the functions of an assignee under the statute?

This decision is not, we think, opposed to the case of Walker v. Gill, 2 Bailey, 105, cited by the plaintiff, in which the learned judge says, he is "not aware of any instance in which the law requires an act to be done for the purpose of giving notice, and regards the doing of it as implied notice, that the parties concerned will not be affected with express notice." That was an action by a creditor against an administrator, on a demand, of which, by the statute of South Carolina, he should have given notice within one year after administration taken; and the defendant, to avoid the effect of the statute, relied on the fact that the plaintiff had actual notice. But the court proceeded on the ground that publication was not necessary, as a condition, to give effect to the limitation, but, like registration of a conveyance, only to give notice. Had that statute, like ours on the same subject, made the term of limitation commence at the time of giving public notice, actual personal notice to an individual would not have made the statute take effect as to him: Emerson v. Thompson, 16 Mass. 429; nor have been a substitute for the publication, which alone can call the statute into effectual opposition.

But the distinction is, that the publication under the insolvent act of 1838, although one purpose of publication is to give notice of the proceedings, is not required for the purpose of giving notice of another substantive and efficient act, but is itself the act which gives effect and operation to the subsequent deed of assignment, fixes the time at which it takes effect, and without which, such subsequent assignment has no effect to transfer the debtor's property.

*Plaintiff nonsuit.*¹ D

¹ Similarly, in the English law, notice that a debtor is about to commit an act of bankruptcy (which fixes the time to which the trustee's title relates) will not invalidate transactions with the debtor. *Ex parte Hallifax*, 2 Mont. D. & DeG. 544; *Hocking v. Acraman*, 12 M. & W. 170; *Ex parte Arnold*, 3 Ch. D. 70. The Bankruptcy Act of 1883 provides, however, section 4 (h), that it is itself an act of bankruptcy "if the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts."

BUTLER v. MULLEN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER, 1868.

[Reported in 100 Massachusetts, 453.]

CONTRACT by the assignees in insolvency of Henry J. Holbrook, an insolvent debtor, to recover a sum of money due from the defendants to Holbrook.

It was admitted that the defendants were liable for the amount claimed, unless the following agreed facts furnished a defence.

The defendants were summoned as the trustees of Holbrook in an action brought by Simeon Snow against Holbrook, and were charged as trustees on the 13th of October, 1866, on default; judgment was entered against Holbrook on the 19th; execution issued thereon on the 20th; and the defendants, on the 22d of the same October, paid over the said amount to the deputy sheriff, who held the execution, on his demand.

On the 10th of October, 1866, a warrant in insolvency was issued against Holbrook; the first publication of the issuing thereof was made on the 11th of October; and on the first of November following the plaintiffs were appointed assignees, and received an assignment of Holbrook's property.

No suggestion of Holbrook's insolvency was ever made on the record in the case of Snow against Holbrook, and no notice of said proceedings in insolvency was ever received by the defendants, nor was any given to them, unless the issuing of the warrant in insolvency, and the first publication of the issuing of the same, were notice to them.

On the above facts, in the Superior Court, judgment was ordered for the defendants, and the plaintiffs appealed.

E. Avery, for the plaintiffs.

H. W. Bragg, for the defendants.

HOAR, J. The defendants were summoned as trustees, and charged as such upon their default on the 13th of October, 1866; and a judgment being entered against Holbrook, the principal defendant, on the 19th of the same October, execution issued on the 20th of the same month, and they paid over the amount due upon the execution, upon the demand of the officer who held it, on the twenty-second day of the same month. A warrant of insolvency issued against Holbrook, October 10, 1866, the first publication was made on the next day, and the plaintiffs were appointed assignees of his estate on the 1st of November following.

Upon these facts we think the defence to this action cannot be maintained. The payment by the defendants upon the judgment against them as trustees was a valid payment as against Holbrook, his executors and administrators. Gen. Sts. c. 142, § 37. But it had no validity

against a party whose title intervened before the judgment against them was rendered, and whose title was superior to the attachment by which the fund had been held. Not only does the assignment, when made, relate back to the first publication of the notice in insolvency, and vest all the property of the debtor in the assignee, but before the assignment the debtor is so far divested of his property, by virtue of the issuing of the warrant, that from the first publication no transfer or conveyance of it can be made which will have any validity against the assignee. Gen. Sts. c. 118, § 44; *Clarke v. Minot*, 4 Met. 346; *Judd v. Ives*, Ib. 401; *Edwards v. Sumner*, 4 Cush. 393; *Gallup v. Robinson*, 11 Gray, 20. By the assignment, the debt which the defendants owed to Holbrook on the 11th of October became due to the plaintiffs, and vested in them as a chose in action on and after that day; and a subsequent payment to Holbrook or to any other person other than the plaintiffs does not discharge the debt.

The defendants cannot be allowed to show that they had no notice of the insolvency, as the publication of the notice of the issuing of the warrant is legal notice to all persons, by which they are bound. *Clarke v. Ives*, *ubi supra*; *Edwards v. Sumner*, *ubi supra*; *Hall v. Whiston*, 5 Allen, 126; 5 Bac. Ab. Trover, E. 12.

*Judgment for the plaintiffs.*¹

SECTION II.

SITUS OF THE PROPERTY.

HUNTER v. POTTS.

KING's BENCH, 1791.

[Reported in 4 Term Reports, 182.]

THIS was an action for money had and received, to which the defendant pleaded the general issue. On the trial before Lord KENYON at Guildhall a special verdict was found, which, after setting forth the formal parts (namely, the trading, the petitioning creditor's debt, the

¹ *Willis v. Freeman*, 12 East, 656; *Coles v. Coles*, 6 Hare, 517; *Re Calcott* [1898], 2 Ch. 460; *Conner v. Long*, 104 U. S. 228, 232; *Re Gregg*, 1 Hask. 173; *Re Lake*, 3 Biss. 204; *Howard v. Crompton*, 14 Blatch. 328; *Sicard v. Buffalo, &c. Ry. Co.*, 15 Blatch. 525; *Stevens v. Mechanics' Bank*, 101 Mass. 109; *Palmer v. Jordan*, 163 Mass. 350; *Duffield v. Horton*, 73 N. Y. 218, *acc.*

It has been held that even an officer acting under the order of a court is liable for dealing in good faith with property of a bankrupt after the day to which the trustee's title has relation. *Cooper v. Chitty*, 1 Burr. 20; *Balme v. Hutton*, 1 Crompt. & M. 262; *Garland v. Carlisle*, 4 Cl. & Fin. 693. But the United States Supreme Court refused to follow these precedents. *Conner v. Long*, 104 U. S. 228. See also *Johnson v. Bishop*, 1 Woolw. 324; *Bradley v. Frost*, 3 Dill. 457.

bankruptcy, the commission, and assignment), stated that the bankrupts before their bankruptcy were indebted to the defendant on a contract made in England; at which time, and also at the time of the bankruptcy, and until the assigning of the attachment hereafter mentioned, all the parties were resident in England; that after the issuing of the commission of bankrupt, and the making of the assignment, the defendant, knowing thereof, gave orders to his attorney in Rhode Island, North America, to attach the effects of the bankrupts in that island; in consequence of which the attorney, in May, 1785, attached, in the regular way, certain moneys in the hands of J. and W. Russell, which were due from them to the bankrupts at the time of the bankruptcy; and in November, 1786, obtained, in the Court of Common Pleas in Rhode Island, a regular judgment against the bankrupts for £496 12s. 9d. and costs, which sum he afterwards received and remitted to the defendant in England, who claims to hold the same to his own use. The verdict also stated that the proceedings of the court in Rhode Island were continued by imparlances from May, 1785, to November, 1786, at the request of the Russells, in order that the bankrupts might have notice of such proceedings.

Lord KENYON, C. J., now delivered the opinion of the court.

2 In the argument in this case many quotations were made from the writers on the civil law, which it is not necessary to consider in determining this question. Generally speaking, it must be admitted that personal property must be governed by the laws of that country where the owner is domiciled. Neither do we mean to break through the rule that the courts of one country ought to pay a proper deference to the decisions of the courts in another having competent jurisdiction, where the facts on which the decision was made were fairly disclosed to such court. But the general question here is, whether the assignment which was executed by the commissioners of the bankrupt was sufficient to vest the bankrupt's property in the plantations abroad in the assignees under the commission; because if it did so vest at the time of the assignment, it is immaterial to consider in this case how far the relation under the bankrupt laws should take effect in Rhode Island, since the assignment was executed anterior to the time when the attachment suit was there commenced. Therefore the only question here is, whether or not the property in that island passed by the assignment in the same manner as if the owner (the bankrupt) had assigned it by his voluntary act. And that it does so pass cannot be doubted, unless there were some positive law of that country to prevent it. Every person having property in a foreign country may dispose of it in this; though indeed if there be a law in that country directing a particular mode of conveyance, that must be adopted; but in this case no law of that kind is stated, and we cannot conjecture that it was not competent to the bankrupt himself, prior to the bankruptcy, to have disposed of his property as he pleased. Now, the bankrupt statutes have expressly enacted that the commissioners may assign all the property of the bankrupt in

the most extensive words ; and, therefore, on the general reason of the thing, if there be no positive decision to the contrary, no doubt could be entertained but that, by the laws of this country, uncontradicted by the laws of any other country where personal property may happen to be, the commissioners of a bankrupt may dispose of the personal property of a bankrupt resident here, though such property be in a foreign country. Then let us consider the decisions which have been made on this subject. The case of *M'Intosh v. Ogilvie* agrees with our opinion. There, it is to be observed, that Lord Hardwicke, on his being told that the defendant in that case had not obtained a sentence before the bankruptcy, said : " Then it is like a foreign attachment, by which this court will not suffer a creditor to gain priority, if no sentence were pronounced before the bankruptcy." In another part he intimated a strong opinion that the property in Scotland should not be taken by one creditor to the prejudice of the rest of the creditors here. And at the close of that case the Solicitor-General observed that this precise question had been determined. But the case of *Beckford v. Turner* was relied on, when this case was first argued, as a determination in favor of the attachment creditor ; but certainly no question of that kind was stated among the reasons signed by the counsel, nor was it brought in judgment in that case. The single question there was whether or not the proceedings in the island of Jamaica were conformable to the mode pointed out by the act of assembly there. And if it had been stated in the reasons signed in that case, this question could not have arisen in deciding it. There was indeed a dictum, rather than a decision, in *Wilson's* case that the assignment by the commissioners had no other effect than a voluntary assignment. I believe the doubt in all these cases has arisen from not attending to the meaning of the word " voluntary." It has been contended that it means " without a valuable consideration ;" but it is impossible to consider it in that light, for in the case of a bankruptcy there must be a consideration. It means the bankrupt's own voluntary act, as contradistinguished from a compulsory act by law. Therefore, on the reason of the thing, even without any authorities, we have no difficulty in saying that the title of the plaintiffs must prevail. For it must be remembered that during the progress of this business all these parties resided in England ; that the defendant, knowing of the commission and of the assignment, in order to gain a priority, transmitted an affidavit to Rhode Island to obtain an attachment of the bankrupt's property there, in violation of the rights of the rest of the creditors, which were then vested ; but such an attempt cannot be sanctioned in a court of law. But in addition to these reasons, the decisions which have been made on this subject remove all doubts whatever. It is not necessary to go through them, because they were mentioned in the argument, and are collected in *Hl. Bl. Rep. C. B.*, 131 and 132 n. ; *Salomons v. Ross*, before Lord Bathurst ; *Jollet and another v. Deponthieu and Barril*, before Lord Camden ; and *Neale and another v. Cottingham and another*, in *Ire-*

land, before Lord Chancellor Lifford. The second of these, I have reason to believe, was considered by Lord Camden as a very clear case, for he did not think it important enough even to make a note of it in his book. And although the last case was not decided in this country, yet it was determined by a very respectable authority, Lord Lifford, assisted by several of the judges; and that noble lord was conversant with the laws of this country, having sat on the bench here for several years before he went to Ireland; and we know also that Davis's reports of the decisions in that country are cited as authority here. There are, therefore, these three decisions, in addition to the case before Lord Hardwicke, in support of our opinion; and there are none to the contrary, except indeed what was said in Wilson's case, and that seems to have turned on mistaking the import of the word "voluntary."

We are, therefore, clearly of opinion that the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.¹

LONG v. GIRDWOOD.

SUPREME COURT OF PENNSYLVANIA, 1892.

[Reported in 150 Pennsylvania, 413.]

McCOLLUM, J. The debt for the collection of which the writ of foreign attachment was issued was contracted in a foreign country. Long and Bisby, who are the plaintiffs in the attachment and the appellants here, are, and since 1863 have been, domiciled at Hamilton in Canada and engaged in business there; the defendants in the attachment are citizens of Scotland and members of the firm of Girdwood & Forrest, wool brokers at Glasgow, which is indebted to the plaintiffs in the sum of \$1,798.85; McCallum, Crease, & Sloan, who are the garnishees in the attachment and the appellees in this issue, are citizens of Pennsylvania, doing business in Philadelphia, and indebted to the

¹ Affirmed *sub nom.* Phillips v. Hunter, 2 H. Bl. 402; Sill v. Worswick, 1 H. Bl. 665; Neale v. Cottingham, 1 H. Bl. 133, n.; *Ex parte* Blakes, 1 Cox, Eq. 398; Royal Bank v. Cuthbert, 1 Rose, 462; Selkirk v. Davies, 2 Dow, 230; Holmes v. Remsen, 4 Johns. Ch. 460 (overruled), acc. See also Chipman v. Manufacturers' Bank, 156 Mass. 147.

Similarly the English courts hold that personal property in England passes by a foreign decree in bankruptcy. Solomons v. Ross, 1 H. Bl. 131, n.; Joliet v. Deponthien, 1 H. Bl. 132, n.; Potter v. Brown, 5 East, 124, 131; *Ex parte* Cridland, 3 V. & B. 94. *Conf. Re* Blitham, 35 Beav. 219, L. R. 2 Eq. 23; *Re* Davidson's Trusts, L. R. 15 Eq. 383.

It is universally held that foreign real estate does not pass. Selkirk v. Davies, 2 Dow, 230; *Ex parte* Rogers, 16 Ch. D. 665; Oakley v. Bennett, 11 How. 33; Chipman v. Manufacturers' Bank, 156 Mass. 147; Chipman v. Peabody, 159 Mass. 420; Barnett v. Pool, 23 Tex. 517. See also Callender v. Colonial Secretary, [1891] App. Cas. 460; Story, Conflict of Laws (8th ed.), 591 seq.

firm of Girdwood & Forrest in the sum of \$2,332.44. On the 11th of October, 1884, proceedings were instituted under the bankrupt laws of Scotland for the sequestration of the estates of the firm of Girdwood & Forrest, and of the several members thereof, for the benefit of their creditors; and on the 27th of that month Thomas Jackson was confirmed as trustee of said estates, with full right and power to sue for and recover the same, wherever situated, for the purposes of the trust. Subsequent to these proceedings, and with notice of them, Long and Bisby came to Pennsylvania, issued a writ of foreign attachment against Girdwood & Forrest, and summoned McCallum, Crease, & Sloan as garnishees.

The question presented by the facts above stated is whether the Canadian creditors of the firm of Girdwood & Forrest can, by process of attachment in Pennsylvania, acquire a preference over other creditors of that firm who reside in Scotland or elsewhere within the British dominions, when the effects of the firm have been duly transferred under the laws of Scotland to a trustee for the benefit of all its creditors. *Harrison v. Sterry et al.*, 5 Cranch, 289; *Green v. Van Buskirk*, 7 Wall. 139, and *Warner's Appeal*, 13 W. N. 505, are cited by the appellants to sustain their contention for a preference, but these cases are not in point. In *Harrison v. Sterry et al.* the attachments were prior to the assignment. In *Green v. Van Buskirk* the main question was whether the judgment of an Illinois court in an attachment proceeding should have the same effect in New York on the title to the property attached as in the State in which it was rendered, and it was held that the judgment of a New York court which denied to the Illinois judgment this effect was erroneous. The contest was between the holders of a chattel mortgage and an attaching creditor of the mortgagor. Bates, who resided in Troy, N. Y., was the owner of certain iron safes in Chicago, Ill., and to secure his indebtedness to Van Buskirk and others executed and delivered to them a chattel mortgage on the safes. Two days after the execution and delivery of this mortgage, Green, who was also a creditor of Bates and a citizen of New York, instituted attachment proceedings in Illinois, by virtue of which the safes were levied upon and subsequently sold in satisfaction of his debt. At the time this attachment was issued the mortgage had not been recorded in Illinois, possession of the safes had not been delivered under it, and Green did not know of its existence. By the laws of Illinois the mortgage was of no validity against the rights and interests of third persons, and the attaching creditor was on the footing of a purchaser. The proceedings were regular, and under these laws a justification of the creditor in the seizure and sale of the property. In a suit brought by the mortgagees against the attaching creditor in a New York court, for taking and converting the sales, it was adjudged on appeal to the Supreme Court of the United States that the attachment proceedings in Illinois constituted a valid defence. The points covered by the judgment were that a State has the right to regulate the transfer

of personal property situate within its limits, and to subject the same to process and execution in its own way by its own laws, and that the decrees of its courts in conformity with these laws are conclusive in other jurisdictions. In Warner's Appeal the attaching creditors at the time of issuing their attachment had no actual knowledge of the assignment, and were therefore held to be within the protection of the proviso to the first section of the Act of May 3, 1855, P. L. 415. It does not appear in the report of the case that they were citizens of the State in which the assignment was made, and the question of comity between the States was not raised or considered. But in *Bacon v. Horne*, 123 Pa. 452, it was distinctly held by this court that a resident of a foreign State, in which an assignment was made by a debtor for the benefit of his creditors, could not come into Pennsylvania and seize property of the assignor in a suit in foreign attachment. It was stated in the case last cited that the manifest object of the Act of 1855 was to protect our own citizens, and it was plainly intimated that none but Pennsylvania creditors can invoke its protection. It matters not whether the attaching creditor is a resident of the State in which the assignment is made or of another State foreign to this jurisdiction. If he is a citizen of a foreign State he can receive no aid here in an effort to obtain a preference in disregard of the assignment. *Lowry v. Hall*, 2 W. & S. 131; *Merrick's Estate*, 5 W. & S. 9; and *Bacon v. Horne*, *supra*. This rule rests on comity between the States, and the only exception to it is in favor of our own citizens.¹

¹ In many States in this country an assignment by operation of the law of a foreign jurisdiction is held ineffectual, even against citizens of that foreign jurisdiction, to transfer property situated within the jurisdiction of the forum. *Harrison v. Sterry*, 5 Cranch, 289; *Taylor v. Geary*, Kirby, 313; *Upton v. Hubbard*, 28 Conn. 274, 284; *Rhawn v. Pearce*, 110 Ill. 350; *Jenks v. Ludden*, 34 Minn. 482, 486; *Sturtevant v. Armsby Co.*, 66 N. H. 557, 559 (*semble*); but see *Crippen v. Rogers*, 67 N. H. 207; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367; *Barth v. Backus*, 140 N. Y. 230; *Ex parte Dickinson*, 29 S. C. 453 (*semble*). But see *contra*, *Reynolds v. Adden*, 136 U. S. 348 (law of La.); *Burk v. McHenry*, 1 Harr. & McH. 236; *Mulliken v. Aughinbaugh*, 1 Pa. 117; *Bagby v. Atlantic, &c. R. R. Co.*, 86 Pa. 291; *Gilman v. Ketcham*, 84 Wis. 60.

It is universally held in this country that such an assignment is ineffectual against citizens of the State where the property is situated. See, besides cases above cited, *Ogden v. Saunders*, 12 Wheat. 213; *Crapo v. Kelly*, 16 Wall. 610, 622; *Felch v. Bugbee*, 48 Me. 9; *Wallace v. Patterson*, 2 Harr. & McH. 463; *Blake v. Williams*, 6 Pick. 286; *Taylor v. Columbian Ins. Co.*, 14 Allen, 354; *Saunders v. Williams*, 5 N. H. 213; *Stillings v. Haley*, 68 N. H. 541; *Kelly v. Crapo*, 45 N. Y. 86; *M'Neil v. Colquhoun*, 2 Hayw. 24; *Milne v. Moreton*, 6 Binn. 353.

In *Paine v. Lester*, 44 Conn. 196, a citizen of a third State was allowed the same rights as a citizen of Connecticut, where the property in question was situated.

How far any discrimination between citizens of different States is constitutional has been questioned in *South Boston Iron Co. v. Boston Locomotive Works*, 51 Me. 585 (conf. *Chafee v. Fourth Nat. Bank*, 71 Me. 514, 526); *Kidder v. Tufts*, 48 N. H. 121, 125; *Sturtevant v. Armsby Co.*, 66 N. H. 557; *Ward v. Morrison*, 25 Vt. 593, 598. But the United States Supreme Court does not seem disposed to take the point. *Reynolds v. Adden*, 136 U. S. 348; *Barnett v. Kinney*, 147 U. S. 476. See also *Bagby v. Atlantic, &c. R. R. Co.*, 86 Pa. 291.

The proceedings in Scotland for the sequestration of the estates of Girdwood & Forrest were founded on the petition of the members of the firm, and are operative against all its creditors residing there. We are now asked by creditors having their domicile in another part of the British dominions to disregard these proceedings and allow them a preference upon the firm effects in Pennsylvania. This we cannot do without an abandonment of our well-settled policy in such cases, — a policy founded in comity and promotive of justice.¹

FRANK v. BOBBITT.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER 22—
DECEMBER 14, 1891.

[Reported in 155 Massachusetts, 112.]

Two trustee processes. Writs dated November 21, 1889. The cases were submitted to the Superior Court, and, after judgment for certain claimants, to this court, on appeal, on agreed facts, in substance as follows.

The plaintiffs in each case were residents of the State of Maryland, and sought to recover in an action of contract for goods sold in that State to the defendants, and brought their actions in this Commonwealth in order to attach funds of the defendants in the possession of the Springfield Fire and Marine Insurance Company, a corporation organized under the laws of this Commonwealth, and having its usual place of business in Springfield in this State. The defendants, who were retail merchants doing business and residing at Spring Hope, Nash County, North Carolina, appeared, and judgments were rendered against them for amounts exceeding the sum held by the trustee. The trustee filed answers disclosing funds in its possession to the amount of \$900 due the defendants at the time of the service of the plaintiffs' writs upon it, under a policy of insurance, as hereinafter set forth.

One Threewitts and one Johnson, both residents of North Carolina, appeared in each action as claimants of the funds in the possession of the trustee, under an assignment made to them by the defendants on November 18, 1889. This assignment, which was valid in the State of North Carolina, set forth that "Whereas, W. V. Bobbitt, of the firm of Bobbitt and Spivey, is justly indebted to his wife, Mary E. Bobbitt, in the sum of \$2,500, evidenced by a bond dated first day of January, 1887, bearing interest at rate of eight per centum from date, which amount was used by the said Bobbitt as capital for the commencement of a general merchandise business by the said W. V. Bobbitt and Joseph J. Spivey, under the firm name of Bobbitt and Spivey, in the

¹ A small part of the opinion is omitted.

town of Spring Hope, Nash County, North Carolina," and whereas that firm was also indebted to certain other residents named of North Carolina, in certain specific sums, and whereas the firm was indebted to various other persons for merchandise, whose names and the amount of whose claims were unknown, therefore the plaintiffs, in consideration of the premises and of the sum of one dollar, had conveyed unto Threewitts and Johnson a certain lot of land in the town of Spring Hope, "and all the stock of goods, wares, and merchandise now in the possession of said Bobbitt and Spivey in the said town of Spring Hope; also certain policies of insurance upon the said stock of goods, wares, and merchandise, viz. Policy No. 221 in the Springfield Fire and Marine Insurance Company of Springfield, Mass. . . . Also the entire stock of whiskey, brandy, liquors, etc., now owned by the said Bobbitt and Spivey in the town of Spring Hope, aforesaid. Also all the accounts, notes, mortgages, or other choses in action, and all other personal property whatsoever, now owned by the said Bobbitt and Spivey."

The assignment further provided that Threewitts and Johnson should hold the property conveyed to them in trust, and, after allotting to Spivey an exemption of five hundred dollars, should sell the same, and, after payment of their commissions and the expense of executing the trust, pay the debts due to the creditors named in the assignment, including the wife of Bobbitt, "*pro rata*, and in full, if there be a sufficiency," and with the residue, if any, should pay the remaining debts owed by the firm, and hand over the remainder, if any, to the members thereof. At the time the assignment was made, the personal property therein mentioned and the insurance policy issued by the trustee to the defendants were delivered to the assignees, but prior thereto a portion of the stock of goods covered by the policy had been destroyed by fire; and the loss thereon was adjusted, so far as the trustee is concerned, at \$900; but there was other insurance. The plaintiffs denied the validity of said assignment, as against their attachments in this Commonwealth, and claimed to hold said funds by virtue thereof.

If the claimants were entitled to the funds, judgment was to be entered for them, and the trustee discharged; otherwise, judgment was to be entered for the plaintiffs, and the trustee charged on the answers.

W. B. Stone, for the plaintiffs.

E. H. Lathrop, for the claimants.

C. A. Birnie, for the trustee.

MORTON, J. The assignment was made on November 13, 1889, and, as the agreed facts state, is valid in the State of North Carolina, where it was made and recorded, and where the assignors and assignees live. At the time the assignment was made, the personal property mentioned in it, and the insurance policy under which the amount is due that is the subject of this suit, were delivered to the assignees. The loss had occurred before the delivery of the policy to them. The assignment conveys, among other things, this and other policies, and "also all the accounts, notes, mortgages, or other choses in action, and all other

personal property," belonging to the assignors. The plaintiffs live in Maryland, and have not become parties to the assignment. It does not appear that any other creditors have done so. The writ upon which the plaintiffs attached the funds in the hands of the insurance company bears date November 21, 1889, and the attachment was made the day following, and was consequently some days after the assignment had been made. There do not seem to be any Massachusetts creditors, nor any parties resident here, whose interests are affected by the assignment. Therefore, the question that arises is wholly between non-residents living in two different States.

The plaintiffs insist that the assignment should be declared void, on account of the preferences which it creates, and because it does not appear to have been assented to by any creditors of the assignees, and is without consideration; and they claim the same right to avoid it on these grounds that an attaching creditor who was a citizen of this State would have. It is to be observed that the assignment is a voluntary one, and not a statutory one, as in Payne v. Lester, 44 Conn. 196, a case much relied on by the plaintiffs, but which was disposed of on the ground that a statutory assignment could have no strictly legal effect outside the State where it arose. As sustaining that proposition, see *Blake v. Williams*, 6 Pick. 286; *May v. Wannemacher*, 111 Mass. 202; *Willitts v. Waite*, 25 N. Y. 577, 587, and cases cited; *Kelly v. Crapo*, 45 N. Y. 86; *Harrison v. Sterry*, 5 Cranch, 289, 298; *Ogden v. Saunders*, 12 Wheat. 213; *Story, Conflict of Laws* (7th ed.), § 414. It is to be noticed further, that the case does not come within the class of cases in which an assignment open to the objections urged against this can be avoided by all attaching creditors resident here. The attaching creditor in this suit lives in Maryland. It is to be said also, that at common law in this State an assignment for the benefit of creditors which creates preferences is not void for that reason, and that there is no statute here which renders invalid such an assignment when made by parties living in another State and affecting property here. *Train v. Kendall*, 137 Mass. 366.

The general rule is, that a personal contract valid by the law of the place where it is made will be regarded as valid elsewhere, and will be enforced in foreign jurisdictions. It is not necessary to inquire whether this rule rests on the comity which prevails between different States and countries, or is a recognition of the general right which every one has to dispose of his property or to contract concerning it as he chooses. Under it, this court has frequently held that a voluntary assignment made by a debtor living in another State for the benefit of his creditors would be regarded as valid here. In *Means v. Hapgood*, 19 Pick. 105, it was held that such an assignment made by the debtor, who lived in Maine, operated to transfer a claim which he had against a party living in this State. The only qualification annexed to such assignments has been, that this court would not sustain them if to do so would be prejudicial to the interests of our own citizens or opposed to public policy.

Whipple v. Thayer, 16 Pick. 25; Daniels v. Willard, 16 Pick. 36; Burlock v. Taylor, 16 Pick. 335; Newman v. Bagley, 16 Pick. 570; Means v. Hapgood, 19 Pick. 105; Wales v. Alden, 22 Pick. 245; Cragin v. Lamkin, 7 Allen, 395; May v. Wannemacher, 111 Mass. 202; Pierce v. O'Brien, 129 Mass. 314; Train v. Kendall, 137 Mass. 366.

Nothing prejudicial to the interests of our own citizens will result from upholding this assignment. And we discover nothing which should lead us to hold it invalid as between parties living in other States in the fact that the wife of one of the assignors may be entitled to receive under it in North Carolina from the assignees money which she lent to her husband, and which constituted the capital of the firm of which he was a member, and by which the assignment in question was made. See Milliken v. Pratt, 125 Mass. 374.

As to the claim of the plaintiffs that they should stand as well as if they were citizens of this State, it may be said, in the first place, that the qualification attached to foreign assignments is in favor of our own citizens as such, and in the next place, that the assignment being valid by the law of the place where it was made, and not adverse to the interests of our citizens nor opposed to public policy, no cause appears for pronouncing it invalid.

In regard to the case of Ward v. Morrison, 25 Vt. 593, it is only necessary to observe that it appeared that the law of Vermont required notice to the debtor of the assignment of a chose in action in order to complete the transfer. It did not appear whether such notice was or was not required by the law of New York, where the assignment was made, and it was accordingly held that it would be assumed that the law of New York was the same as that of Vermont, and the assignment was consequently declared invalid as against a subsequent claimant. It is clear that in this State no such notice is required. Wakefield v. Martin, 3 Mass. 558; Norton v. Piscataqua Ins. Co. 111 Mass. 532, 535. See also Murphy v. Collins, 121 Mass. 6.

According to the agreed statement of facts, the entry must be,
*Judgment for claimants, and trustee discharged.*¹

¹ Similarly general assignments valid where made have been held effectual to pass title to property in another jurisdiction as against creditors resident in a third jurisdiction. Schuler v. Israel, 27 Fed. Rep. 851; Schroder v. Tompkins, 38 Fed. Rep. 672; May v. First Nat. Bank, 122 Ill. 551 (land); Woodward v. Brooks, 128 Ill. 222 (semble); Juillard v. May, 130 Ill. 87; J. Walter Thompson Co. v. Whitehead, 185 Ill. 454; Cunningham v. Butler, 142 Mass. 47; Sanderson v. Bradford, 10 N. H. 260; Moore v. Bonnell, 31 N. J. L. 90; Bentley v. Whittemore, 19 N. J. Eq. 462; Green v. Wallis Iron Works, 49 N. J. Eq. 54; Weider v. Maddox, 66 Tex. 372; Cook v. Van Horn, 81 Wis. 291.

The case is, of course, stronger where the creditor is resident within the jurisdiction where the assignment was made. Woodward v. Brooks, 128 Ill. 222; Roberts v. Norcross, 69 N. H. 533; Wing v. Bradner, 162 Pa. 72.

In a majority of States it is also held that an assignment is operative even against citizens of the State where the property is situated. Caskie v. Webster, 2 Wm. Jr. 131; First Nat. Bank v. Walker, 61 Conn. 154; Walters v. Walker, 9 Fla. 86; King v. Glass, 73 Ia. 205; Coffin v. Kelling, 83 Ky. 649; B. & O. R. R. v. Glenn, 28 Md.

BARTH v. BACKUS.

NEW YORK COURT OF APPEALS, OCTOBER 17–NOVEMBER 28, 1893.

[Reported in 140 *New York*, 230.]

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department, entered upon an order made February 15, 1893, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought originally by plaintiff as general assignee for the benefit of creditors of the Wilkin Manufacturing Company, a corporation of Wisconsin, against the Canton Lumber Company, a domestic corporation, to recover an amount remaining unpaid on a bill for machinery furnished by said Wisconsin company to said lumber company. It appeared that after the execution of the assignment and before the bringing of this action, the sheriff of St. Lawrence County attached said debt under warrants of attachment in four several actions. Afterwards, this action having been brought, the amount of the debt was paid into court by said lumber company, and said sheriff and the attaching creditors, who were New York corporations, were substituted as defendants.

Further facts are stated in the opinion.

Nelson L. Robinson, for appellant.

Thomas Spratt and Ledyard P. Hale, for respondent.

ANDREWS, C. J. The general rule that the validity of a transfer of personal property is governed by the law of the domicile of the owner,

237; *May v. Wannemacher*, 111 Mass. 202; *Train v. Kendall*, 137 Mass. 366; *Butler v. Wendell*, 57 Mich. 62, 67; *Covey v. Cutler*, 55 Minn. 18 (*semble*); *Hawkins v. Ireland*, 64 Minn. 339, 345 (*semble*); *Askew v. La Cygne Bank*, 83 Mo. 366; *Sortwell v. Jewett*, 9 Ohio 181 (land); *Fuller v. Steiglitz*, 27 Ohio St. 355; *Johnson v. Sharp*, 31 Ohio St. 611; *Ex parte Dickinson*, 29 S. C. 453, 460; *Weider v. Maddox*, 67 Tex. 372 (*semble*); *Hanford v. Paine*, 32 Vt. 442, 455, 458 (*semble*); *Cook v. Van Horn*, 81 Wis. 291; see also *Phillips, etc. Co. v. Whitney*, 102 Fed. Rep. 838. But see *contra*, *Halsted v. Straus*, 32 Fed. Rep. 279 (*semble*); *Heyer v. Alexander*, 108 Ill. 385; *Henderson v. Schaas*, 35 Ill. App. 156; *Townsend v. Cox*, 151 Ill. 62; *Smith v. Lamson*, 184 Ill. 71; *Whithed v. J. Walter Thompson Co.*, 86 Ill. App. 76; *Fox v. Adams*, 5 Me. 245; *Hughes v. Lambertville Electric Co.*, 53 N. J. Eq. 435; *Happy v. Prickett*, 64 Pac. Rep. 528 (Wash.).

An assignment in violation of the law or policy of the jurisdiction where the property is situated, it is everywhere agreed, will not be enforced there. *Barnett v. Kinney*, 2 *Iris*, 706; *Townsend v. Cox*, 151 Ill. 62; *Barth v. Iroquois Furnace Co.*, 63 Ill. App. 323; *Whithed v. J. Walter Thompson Co.*, 86 Ill. App. 76; *Moore v. Church*, 70 Ia. 208; *Franzen v. Hutchinson*, 94 Ia. 95; *Ex parte Dickinson*, 29 S. C. 453; *Ayres v. Desportes*, 56 S. C. 544. Compare, however, the following cases where a preferential assignment was upheld, though preferences were not allowed by the *lex fori*. *Atherton v. Ives*, 20 Fed. Rep. 894; *Train v. Kendall*, 137 Mass. 366; *Frank v. Bobbitt*, 155 Mass. 112; *Moore v. Bonnell*, 31 N. J. L. 90; *Fuller v. Steiglitz*, 27 Ohio St. 355.

is in most jurisdictions held to apply to a transfer by voluntary assignment by a debtor of all his property for the benefit of creditors, as well as to a specific transfer by way of ordinary sale or contract; and the title of such assignee, valid by the law of the domicile, will prevail against the lien of an attachment issued and levied in another State or country subsequent to the assignment, in favor of a creditor there, whether a citizen or non-resident, upon a debt or chattel belonging to the assignor, embraced in the assignment, provided the recognition of the title under the assignment would not contravene the statutory law of the State, or be repugnant to its public policy. The decisions are not uniform, but this is the general rule, supported by the preponderating weight of authority, and is the settled law of this State. *Ockerman v. Cross*, 54 N. Y. 29; *Bishop on Insolvents*, §§ 241, 265, and cases cited. But this general rule is subject to a qualification established in the jurisprudence of the American States, that a title to personal property acquired *in invitum* under foreign insolvent or bankrupt laws, good according to the law of the jurisdiction where the proceedings were taken, will not be recognized in another jurisdiction where it comes in conflict with the rights of creditors pursuing their remedy there against the property of the debtor, although the proceedings were instituted subsequent to and with notice of the transfer in insolvency or bankruptcy. *Holmes v. Remsen*, 20 Johns. 229; *Kelly v. Crapo*, 45 N. Y. 87; *In re Waite*, 99 N. Y. 433; 2 Kent Com. 406, 407. This exception proceeds upon the view that to give effect to such a transfer arising by operation of law, and not based upon the voluntary exercise by the owner of the *jus disponendi*, would be to give the foreign law an extraterritorial operation, which the rule of comity ought not to permit to the prejudice of suitors in another jurisdiction. The cases in this State since the case of *Holmes v. Remsen*, 4 Jo. Ch. 460, in which the chancellor sought to maintain the English doctrine on the subject, have uniformly sustained the rights of domestic attaching creditors against a title under a prior statutory assignment in another State or country, the several States of the Union being treated for this purpose as foreign to each other. *Willits v. Waite*, 25 N. Y. 577; *Johnson v. Hunt*, 23 Wend. 87; *Kelly v. Crapo*, *supra*.

The general question in this case involves the point whether the assignment made by the Wilkin Manufacturing Company, under the statute of Wisconsin, is to be treated as a voluntary assignment, not in conflict with our laws or policy, or whether, in view of the compulsory clauses of that statute, it is to be regarded as in the nature of a bankrupt law, and ineffectual to transfer title to the property of the insolvent in our jurisdiction as against attaching creditors. In considering whether the title of the assignee in Wisconsin is paramount to the claims of creditors here, who, subsequent to the assignment, procured attachments against the debt owing to the Wilkin Manufacturing Company by the Canton Lumber Company, a reference to the Wisconsin statute under which the assignment was made, becomes important

The original statute upon the subject of voluntary assignments by failing debtors, was similar to the statute in this State upon the same subject. It was a statute prescribing the conditions of such assignments and regulating the administration of the trust for the protection of creditors. In 1889, radical changes were made in the statutory system of Wisconsin, and the prior statute was amended. The amendments, among other things, provided that the assignor in a voluntary assignment for the benefit of his creditors, made under, or in pursuance of the laws of the State, "may be discharged from his debts as a part of the proceedings under such assignment, upon compliance with the provisions of this act." It further declared that every creditor of the insolvent debtor residing within or without the State who should accept a dividend out of the assigned estate, or in any way, by proving his claim or otherwise, participate in the proceedings under the assignment, shall be "deemed to have appeared in the matter of such assignment and the application for a discharge, and should be bound by any order or discharge granted by the court," subject to the right of appeal. Under the statute, a creditor, by accepting a dividend, thereby consented to a discharge of the debtor from the portion of the debt remaining over and above his share of the assets, and unless a creditor comes in under the assignment, he is debarred from receiving anything out of the assigned property, unless indeed a surplus should remain after payment of the participating creditors in full, although it seems the debt would remain as a claim against the insolvent.

The power to discharge a contract without payment or satisfaction and without the consent of the parties, is a power which pertains to the sovereign alone. The statute of Wisconsin does not assume to discharge the debts owing by the insolvent assignor absolutely. But, as has been said, it deprives creditors who do not come in under the assignment, of all share in the assigned estate, unless in the improbable contingency of a surplus. This coercive feature of the scheme, if contained in a voluntary general assignment for the benefit of creditors, would render the assignment void. *Grover v. Wakeman*, 11 Wend. 189. The statute of Wisconsin, however, incorporates this feature and the law is recognized by the courts of Wisconsin as an insolvent law. *Holton v. Burton*, 78 Wis. 321; *Hempsted v. Ins. Co.*, Id. 375. This court had occasion in the case of *Boese v. King*, 78 N. Y. 471, to consider a similar provision in a statute of New Jersey, regulating voluntary assignments for the benefit of creditors in that State, and it was assumed that the provision in that act was in the nature of a bankrupt law. Effect cannot be given here to this coercive feature in the Wisconsin law, except by giving extraterritorial effect to the law of that State. The assignor had no power to make such a condition, and if it is legal it is by force of the statute alone. This feature is one of the distinguishing tests of an insolvent or bankrupt law. The assignment was voluntary in the sense that the Wilkin

D Manufacturing Company were not coerced into executing it, and the title to the property was vested in the assignee by its own act. But, whether it is to be treated as voluntary in another jurisdiction when the claims of creditors there are in question, is the point. The assignment purports to have been made under and in pursuance of the law of Wisconsin. The assignor, by proceeding under that law, presumably designed to avail itself of the provision for a discharge. This could only be accomplished by force of the law. The right of an insolvent or bankrupt to initiate voluntary proceedings in bankruptcy is a common feature in bankrupt laws, but that fact does not make the assignment voluntary, so as to give extraterritorial operation to the proceedings. This point was adverted to in the case of *Upton v. Hubbard*, 28 Conn. 274, where the court said: "In our view there is essentially no difference whether, in consequence of an act of bankruptcy, as in England, the bankrupt's estate is forced from him, or he himself sets the law in motion by a conveyance in bankruptcy in the first instance. Under the Wisconsin statute the transfer is voluntary, but the law steps in and regulates the distribution of the assigned estate in accordance with conditions which the sovereign alone can prescribe. It would, we think, be disregarding the substance to hold that the voluntary feature of the law distinguishes it from the class of bankrupt or insolvent statutes which, by general consent in this country, are held to be ineffectual to transfer the title of the insolvent to property in another State, as against attaching creditors there.

It is insisted, however, in behalf of the plaintiff, that, assuming that the title of the assignee would be subordinate to the lien of attachments, issued here at the suit of resident creditors, this priority cannot be claimed in behalf of Wisconsin creditors who, knowing of the assignment, seek to gain a preference under our attachment laws, and that the banks to whom the claims were assigned after maturity, and who took with notice of the assignment, stand in no better position than the original creditors. In some of the States, which refuse to recognize the validity of the title of a foreign assignee, even in case of voluntary assignment, where it comes in conflict with the claims of domestic creditors, a distinction is made, and it is held that where the domicile of the foreign assignee and the creditor is the same, the latter will be bound by the title of the former, good by the law of the common domicile. *May v. Wannemacher*, 111 Mass. 202; *Sanderson v. Bradford*, 10 N. H. 260; *Moore v. Bonnell*, 2 Vroom, 90. The principle of comity in these States is held to apply so as to subject non-residents to the operation of the foreign law, but not so as to prevent domestic creditors from pursuing their remedy in defiance of the foreign assignment. *Faulkner v. Hyman*, 142 Mass. 53.

The question is not an open one in this State. We have refused to adopt the distinction made in some of the States, and have placed the right of a creditor coming here from the State of the common domicile upon the same footing as that of a citizen or resident creditor, and

have sustained the lien of an attachment issued here at the instance of a foreign creditor after proceedings in insolvency had been instituted in the State of the common domicile of the insolvent and creditor. *Hibernia Natl. Bank v. Lacombe*, 84 N. Y. 367. There the debtor and attaching creditor were Louisiana corporations. The attachment was issued after the debtor bank had been placed in liquidation under the laws of that State and commissioners had been appointed to take possession of and administer its assets. DANFORTH, J., after stating the general rule that the law of Louisiana could have no operation here, referring to the point now under consideration, said: "The plaintiff, as we have seen, although a foreign creditor, is rightfully in our courts pursuing a remedy given by our statutes. It may enforce that remedy to the same extent, and in the same manner, and with the same priority, as a citizen. Once properly in court and accepted as a suitor, neither the law nor court administering the law will admit any distinction between the citizen of its own State and that of another." How far our courts will enforce the title of a foreign assignee in bankruptcy as between the assignee and the bankrupt or his creditors, where all the parties have a common domicile abroad, was much discussed in the case of *Abraham v. Plestoro*, 3 Wend. 548, and that case, with others, were reviewed in the case of *In re Waite*, *supra*. The authority of *Hibernia Bank v. Lacombe* upon the point now in question was expressly recognized and approved in *Warner v. Jaffray*, 96 N. Y. 248, and it must be regarded as establishing the law of the State on the subject. In *Warner v. Jaffray* the court refused to interfere with liens acquired by citizens of this State upon personal property in another State under the laws of that State, belonging to an insolvent resident here, under proceedings commenced after a voluntary assignment for the benefit of creditors, valid by the laws of this State, had been made and delivered. It was in substance held that creditors of the assignor, citizens of this State, were not, because of such citizenship, precluded from taking proceedings in another State hostile to the assignment, for the purpose of acquiring priority in respect of personal property situated there embraced in the assignment. See, also, *Johnson v. Hunt*, *supra*. The courts of this State accord to our citizens the same liberty to proceed in another jurisdiction in hostility to assignments executed here which they accord to citizens of other States coming here and instituting proceedings in hostility to transfers in insolvency, valid by the laws of their domicile. The rule in New York on the question is also the rule in other States. *McClure v. Campbell*, 71 Wis. 350; *Rhawn v. Pearce*, 110 Ill. 350; *Boston Iron Works v. Boston Locomotive Works*, 51 Me. 585; *Upton v. Hubbard*, *supra*. It follows, therefore, that the attachments in question created valid liens on the debt attached in priority to the title under the assignment, assuming the claim of the plaintiff that the banks stood in no better position than the Wisconsin creditors.

The point that the provisions in the Wisconsin statute providing for

a discharge of insolvent debtors apply to natural persons only, and not to corporations, is opposed to the statutory construction of the word "person," as defined in the Revised Statutes of that State, and there is nothing in the charter of the corporation, so far as appears, or in the statutes of Wisconsin, which takes from this corporation the general powers which, in the absence of any statutory or charter restriction, belong to corporations to make an assignment in insolvency. *DeRuyter v. St. Peter's Church*, 3 N. Y. 238. This judgment is not, we think, in accord with the law of this State, and must, therefore, be reversed. The case was argued at our bar with great ability, and the researches of the several counsel have materially lightened the labors of the court.

The judgment should be reversed and a new trial granted.

All concur.

*Judgment reversed.*¹

WITTERS v. GLOBE SAVINGS BANK OF CHICAGO.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY 28-
JUNE 22, 1898.

[Reported in 171 *Massachusetts*, 425.]

TRUSTEE process. The Chicago Title and Trust Company, a corporation organized under the laws of the State of Illinois, petitioned to be allowed to intervene as a claimant of the funds. The plaintiff was an inhabitant of Vermont.

The case was submitted to the Superior Court, and, after judgment charging the trustee and dismissing the petitioner's claim, to this court, on appeal, upon agreed facts, which appear in the opinion.

R. B. Kendall, for the claimant.

F. H. Williams, for the plaintiff.

FIELD, C. J. In this case the plaintiff is not an inhabitant of Massachusetts, but of Vermont. The Chicago Title and Trust Company claims title to the funds in the hands of the alleged trustee, not only by virtue of the decree of the Circuit Court of Cook County in the State of Illinois, entered on April 5, 1897, appointing it a receiver of the defendant, but by virtue of an assignment under seal to it as such receiver, executed by the defendant on April 6, 1897, in pursuance of the decree. That assignment purports to convey to the receiver all the property and effects of the defendant "wheresoever situate." The defendant is a corporation organized under the laws of the State of Illinois, and it is agreed that said Circuit Court "had jurisdiction to

¹ *Townsend v. Coxe*, 151 Ill. 62; *Weider v. Maddox*, 66 Tex. 372, 376 (*semble*) *acc.* See also *Franzen v. Hutchinson*, 94 Ia. 95.

Sanderson v. Bradford, 10 N. H. 260, 264, *contra*.

appoint said receiver." The plaintiff's writ was served on the alleged trustee on April 13, 1897. Such an assignee has a right to intervene in the proceedings and claim the funds. *Buswell v. Order of the Iron Hall*, 161 Mass. 224; *Dennis v. Twitchell*, 10 Met. 180; *Norton v. Piscataqua Ins. Co.*, 111 Mass. 532.

We think that the assignment must be held valid as against the subsequent attachment by the plaintiff. *Frank v. Bobbitt*, 155 Mass. 112; *Faulkner v. Hyman*, 142 Mass. 53. It is argued by the counsel for the plaintiff that the assignment shown in this case is not voluntary, and so should not be sustained as against the attachment, and *Taylor v. Columbian Ins. Co.*, 14 Allen, 353, is relied on. The assignment in this case is not a judicial assignment or a statutory assignment, but a compulsory assignment, valid by the laws of Illinois, where it was made. How far such an assignment can be regarded as having the effect of a voluntary assignment, or as having only the effect of a judicial or statutory assignment, has not been decided in this Commonwealth.

As a general rule, assignments and conveyances which defendants in equity are compelled to make are as valid as if voluntarily made.¹ The case sets out no statutes of the State of Illinois, and we cannot take judicial notice of such statutes. We must assume on the papers before us that the receiver was appointed under the general powers of a court of equity, and that the assignment was made by a defendant over which the court had full jurisdiction. See *High*, (3d ed.) § 244; *Gluck & Becker, Receivers* (2d ed.) 225 *et seq.* It seems to have been assumed by all parties that the assignment was made for the creditors of the defendant under proceedings for their benefit. Whatever may be true of such an assignment when credits of the assignor are attached here by inhabitants of Massachusetts, we perceive no good reason why we should protect against the rights of the assignee, an attachment made by an inhabitant of Vermont after the assignment. See *Cunningham v. Butler*, 142 Mass. 47, 52; *Cole v. Cunningham*, 133 U. S. 107, 128; *May v. Wannemacher*, 111 Mass. 202; *Long v. Girdwood*, 150 Penn. St. 413; *Burlock v. Taylor*, 16 Pick. 335.

Judgment of the Superior Court charging the trustee and dismissing the petition of the claimant reversed, and judgment to be entered allowing said petition and discharging the trustee.

¹ Many cases to this effect are collected in *Ames's Cases on Equity Jurisdiction*, p. 10.

SECTION III.

DISSOLUTION OF LIENS.

IN RE EMSLIE.

CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, MAY 24, 1900.

[Reported in 102 Federal Reporter, 291.]

BEFORE WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal from an order, granted upon the application of a trustee in bankruptcy, staying an action brought in a State court by a subcontractor to foreclose a lien, claimed under the New York mechanic's lien law, for the labor and materials furnished in building a house. The notice of lien was filed by the subcontractor April 28, 1899. August 15, 1899, upon a petition in involuntary bankruptcy filed by creditors, the contractors who erected the house for the owner of the real estate were adjudicated bankrupts. The action to foreclose the lien was commenced August 16, 1899.

We agree with the court below that a valid lien was not acquired by the subcontractor, owing to the omission to comply with the terms of the statute, which required the notice of lien to specify "the agreed price or value of the labor performed or to be performed and materials furnished or to be furnished," and "the time when the first and last items of work are performed and materials are furnished." Laws N. Y. 1897, c. 418, § 9. The notice of lien does not attempt to comply with either of these requirements, but states merely that "there remains due and unpaid (under contracts with Holland Emslie & Son) the sum of \$1,700." Not only is there no statement of the contract price, or the value of the work and materials, or of the time when the first and last items were furnished, but there are no statements which by any possible implication can supply any information about these facts. The statute is to be liberally construed in aid of every beneficial purpose which was contemplated in its enactment, and a substantial compliance with its provisions is sufficient to uphold the lien. But a construction which would uphold a notice like the present would nullify its provisions, which are intended for the benefit of every claimant as well as for the owner of the property. *Foster v. Schneider* (Sup.) 2 N. Y. Supp. 875; *Brandt v. Verdon* (Com. Pl.) 18 N. Y. Supp. 119. As was said in the former of these decisions:

"To entitle a claimant to its benefits, the directions of the statute must be substantially observed. If they are not, the lien cannot be secured, and the court has no power or authority to sustain the pro-

ceeding: for a substantial compliance with the requirements of the statute is necessary to confer jurisdiction."

We are constrained to differ from the opinion of the court below that the lien was void, as against the trustee in bankruptcy, irrespective of the insufficiency of the notice. The statute gives a lien for the value or the agreed price of the labor and materials from the time of the filing of the notice, authorizes the notice to be filed at any time during the progress of the work or within ninety days thereafter, provides that if an action shall not be brought to enforce the lien within a specified time the lien shall be discharged, and prescribes the procedure in an action to enforce the lien. When the notice is filed, provided the filing is within the period prescribed, the lien binds the property to priority of payment in favor of the lienor for any indebtedness for improving the property due from the owner, as against subsequently acquired rights and titles. It will be observed that, although the lien is not created until the filing of the notice, this is an act optional with the mechanic or material man, and, if he chooses, he can perfect a lien day by day concurrently with the progress of the work.

A trustee in bankruptcy cannot acquire a better title than the bankrupts had, except as to property which has been transferred contrary to the provisions of the bankrupt act, and takes the estate subject to all liens and incumbrances other than those enumerated in section 67. That section denies the privileges of a lien to claims which, for want of record or for other reasons, would not have been valid as against creditors if there had been no bankruptcy, and enumerates the liens and incumbrances which are dissolved by the adjudication of bankruptcy, or can be kept on foot and enforced by the trustee for the benefit of the estate. The latter consists of two classes, — liens obtained through legal proceedings against an insolvent debtor within four months prior to the filing of a petition in bankruptcy against him, and incumbrances created by the act of the bankrupt within four months prior to the filing of the petition, which are intended to defraud creditors or are void by the laws of the State in which the property is situated. The section preserves all liens given or accepted for a present consideration. In our opinion, liens like the present do not fall within either of the two classes. They are not within the first class, because they are not created or obtained through legal proceedings, either in strict definition or in the ordinary meaning of the term. A legal proceeding is any proceeding in a court of justice by which a party pursues a remedy which the law affords him. The term embraces any of the formal steps or measures employed in the prosecution or defence of a suit. In the section it obviously refers to the use of judicial process, the phraseology being "levies, judgments, attachments, or other liens obtained through legal proceedings." The filing of notice of a mechanic's lien has no necessary relation to the initiation or the prosecution of a suit. The filing is essential in order to maintain the action to foreclose the lien, because otherwise the lien does

not attach ; but it is no more a preliminary step in the suit than is the protesting of a note in a suit against the indorser. It is a proceeding of the same kind as filing a chattel mortgage or recording a deed.

Such liens are not within the second class, because they are not an incumbrance created by the debtor. They are created by the statute, or by the act of the lienor in filing the statutory notice. The incumbrances which are invalidated by the section are those which are "made or given" by the person adjudged a bankrupt. They include, not only those specifically mentioned, "conveyances, transfers, and assignments," but all incumbrances, of whatever form, derived from his contractual act. Unless it can be said that the lien emanates in or is created by the contract authorizing the labor and materials to be furnished, it arises without his act. If it is a creature of the contract, rather than of the statute, it is supported by the same consideration, and, being given for a "present consideration," is preserved by the section.

There are no equitable considerations in favor of the general creditors of a debtor which should defeat a mechanic's lien. Every creditor dealing with the debtor does so with the knowledge that those who are furnishing labor and materials for the building can, if they choose, acquire a priority of payment over other creditors. Statutes giving such liens are designed to enable mechanics and material men to rely upon the security of the building itself, without looking to the responsibility of the owner. The justice and expediency of giving such claims priority over the debts of general creditors is manifested in the legislation of the several States. We cannot believe that it was the intention of Congress to put them upon the footing of the liens particularly mentioned in section 67. The question of the validity of such liens was considered by the Circuit Court of Appeals for the Seventh Circuit. *In re Kerby-Dennis Co.*, 36 C. C. A. 677, 95 Fed. 116. In considering the provisions of section 67 the court used this language :

"We cannot indulge the presumption that Congress intended to avoid a lien secured by the act of labor, and preserved and continued in force only when legal proceedings are instituted within a specified time. Such a construction would avoid all mechanic's liens, and all the liens of laborers, which the laws of various States have for years sought to protect and to prefer."

We agree with the opinion of that court that the terms of section 67 do not invalidate such a lien. The learned judge in the court below thought the lien given by the New York statute was to be distinguished from the lien given by the statute of Michigan, which was under consideration in that case, by the circumstance that the lien under the New York statute originates in the filing of the notice of lien, while in the Michigan statute it originates by the act of furnishing the labor or materials, and is thus a strictly contemporaneous lien. We do not discover any substantial distinction between the two statutes. In one the lien is not given unless the notice is filed ; in the other, although it

arises when the labor or materials are furnished, it is lost unless a notice is filed within a specified time. The object of both statutes is the same, and both accomplish practically the same result. In one the filing of the notice is necessary to perfect the lien, and in the other it is necessary to preserve it. In both it is wholly optional with the lienor whether he will avail himself, or not, of his right of priority.¹

We have thought it necessary to discuss the questions which have been considered in regard to the efficacy of the lien, because, in making the order, the court below passed upon these questions apparently with the view of determining the rights of the parties to the fund in controversy. The order staying the action in the State court was a proper exercise of power, and should not be disturbed. That action was an interference with assets of the bankrupts in the custody of the bankruptcy court over which that court had previously acquired jurisdiction; and, as it was brought without the leave of the court, the order staying its prosecution was properly granted, within the principle of the decision of this court in the recent case of *In re Russell* (C. C. A.) 101 Fed. 248.

The order is affirmed, without costs.

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 SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1874.
Reported in 21 Wallace, 642.

ERROR to the Circuit Court for the Middle District of Tennessee.

Doe, lessee of Vaillant, assignee of Montgomery, a bankrupt, brought ejectment against Childress to recover land in Tennessee.

The question was this:—

When attachment proceedings are regularly commenced, a levy made, and the property is in the possession of the sheriff before the filing of petition in bankruptcy;—when there is no stay of proceedings or other measures in the bankrupt court to arrest the suit in the State court, there being no fraud, a sale is had under the judgment of the State court, a deed is given by the sheriff, and possession taken under it—can the title acquired under such sale be attacked by the assignee collaterally in a suit at law?

In other words, can the assignee allege that under these circumstances

¹ Under the Act of 1867 a mechanic's lien was not dissolved; *Lewis v. Higgins*, 52 Md. 617; *Seibel v. Simeon*, 62 Mo. 257; *Marston v. Stickney*, 55 N. H. 383. See also *Laughlin v. Reed*, 89 Me. 226; or a landlord's statutory lien for rent, *Marshall v. Knox*, 16 Wall. 551; *Morgan v. Campbell*, 22 Wall. 381; *Re Joalyn*, 2 Biss. 238; *Re Wynne, Chase*, 256. In accord under the present act is *McFarland Carriage Co. v. Solanes*, 108 Fed. Rep. 532. But the lien of a distress warrant in Georgia was held dissolved in *Re D. H. Dougherty Co.*, 109 Fed. Rep. 480.

the State court had no jurisdiction to proceed in the action after an adjudication in bankruptcy, and that no title passed to the purchaser under the judgment of the State court?

The defendant's title rested upon a purchase under two decrees in the Court of Chancery of the State of Tennessee. Proceedings in the suit were commenced by attachment on the 15th and 27th days of April, 1867. Decrees in them were obtained in April and June, 1868, and on the 17th of September, 1868, sales were made under the decrees. The purchaser then entered into possession, and the defendant under him now claimed title and possession by virtue of that purchase. By the laws of Tennessee the levy of an attachment gives a specific lien in the property described in them.

Montgomery had filed his petition to be declared a bankrupt on the 18th of February, 1868. This was ten months after the attachment proceedings had been commenced, and four months before the decrees were obtained in those suits, and seven months before the sale took place under those decrees. F

He was adjudged a bankrupt on the 27th of February, 1868. This again was about seven months before the sale under State decrees took place, and ten months after the actual commencement of the attachment proceedings in the State court.

The fourteenth section of the Bankrupt Act enacts that the register shall convey to the assignee all the estate real and personal, of the bankrupt. The section thus proceeds:—

"And such assignment shall relate back to the commencement of the proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate shall vest in said assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings." F

The court below held that the attachment was not dissolved, and gave judgment for the defendant. Thereupon the plaintiff brought the case here.

Mr. *Henry Cooper* for the plaintiff in error. No opposing counsel.

Mr. Justice HUNT delivered the opinion of the court.

The Tennessee Court of Chancery having jurisdiction of the subject of the proceeding in the attachment suits, no defence being interposed by the assignee, in the State court, and no measures having been taken to arrest their proceedings or to transfer them to the bankrupt court (if power to take such steps existed), and there being no fraud proven or alleged, we are of the opinion that a good title was obtained under the decree of sale made in the State court. P

Under the fourteenth section of the Bankrupt Act the title *pendente lite* is transferred by operation of law from the bankrupt to the assignee in bankruptcy. The conveyance of the register operates as would, under ordinary circumstances, the deed of a person having the title, with two differences—first, it relates back to the commencement

of the bankruptcy proceeding; secondly, the register's conveyance dissolves any attachment that has been made within four months previous to the commencement of bankrupt proceedings. Neither of these differences are material in the present case. The attachments here had been made and levied more than four months previous to the commencement of the bankrupt proceedings on the 18th day of February, 1868, to wit, in the month of April, 1867, and no change had taken place in the estate between the filing the petition in bankruptcy and the conveyance by the register.

The transfer of his real estate by a debtor against whom an attachment has been issued, and before judgment or decree, whether by his own act, or by operation of law, cannot impair or invalidate the title of a purchaser under such decree or judgment. It is evident that unless this is so an attachment suit could never be invoked for the collection of a debt. The debtor need only wait until judgment is about to be entered, then make a conveyance of the property attached, and the virtue of the proceeding is at an end. The authorities so declare. A reference to some of the authorities in Tennessee will be sufficient.

The statute of that State provides as follows:—

“Any transfer, sale, or assignment made after the filing of an attachment bill in chancery, or after the suing out of an attachment at law of property mentioned in the bill of attachment as against the plaintiff, shall be inoperative and void.”

The object of this statute (says the court) was to prevent the debtor from evading the attachment after the bill had been filed, and before the levy, by sale or transfer of his estate. See Drake on Attachments, that this is the general rule of law.

The Bankrupt Act is based upon this theory. Thus the enactment that the register's conveyance shall work a dissolution of an attachment made within four months next preceding the commencement of the bankrupt proceedings, is a virtual enactment that where the attachment is made more than four months before the commencement of the bankrupt proceeding, it shall not be dissolved, but shall remain of force. If all attachments were intended to be dissolved it would be quite idle to declare that those made within four months should be dissolved.

Accordingly, it has been held many times in the various courts of the country, that as to the class of attachments not within the four months' limitation, the bankruptcy proceedings do not work their dissolution; that the debtors' title passes to the assignee, subject to the creditor's lien acquired by virtue of the attachment, and that a judgment to be enforced against the property attached, but not against the person of the debtor or any other property, may be entered, although a discharge has been granted, and is pleaded in bar of the action. Numerous cases to this effect are collected in Bump on Bankruptcy.

We think this is a sound exposition of the statute.

Where the power of a State court to proceed in a suit is subject to be impeached, it cannot be done except upon an intervention by the

assignee, who shall state the facts and make the proof necessary to terminate such jurisdiction. This rule gains whether the four months' principle is applicable or whether it is not applicable.

In *Kent v. Downing* the court say: "The assignee may on his own motion be made a party, if for no other reason than to have it properly made known to the court that the defendant has become bankrupt. He has also a right to move to dismiss the attachment. The adjudication of bankruptcy must be made known to the court in some authentic mode. It may be denied, and the State court cannot take notice of the judgment of other courts by intuition. They must be brought to the notice of the court, and this cannot be done without parties."

In *Gibson v. Green*, the same principle is stated.

The application of these principles gives a ready solution of the question presented in the case before us. The issuing of the attachments against the property of Montgomery took place more than four months prior to the filing of his petition in bankruptcy. By the law of Tennessee the levy of the attachments gave a specific lien upon the property described in them.

→ If the assignee had intervened in the suit he would have been entitled to the property or its proceeds, subject to this lien. He did not, however, intervene or take any measures in the case. He allowed the property to be sold under the judgments in the attachment suits, and those under whom the defendant claims purchased it, obtaining a perfect title to the same. The plaintiff has no title upon which he can recover, and the judgment of the Circuit Court to that effect must be.

*Affirmed.*¹

IN RE BLAIR.

DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, APRIL 30, 1901.

[Reported in 108 Federal Reporter, 529.]

Over LOWELL, District Judge. In this case the personal property of the bankrupt was duly attached on mesne process in this Commonwealth more than four months before the filing of the petition in bankruptcy. Thereafter, and within four months before such filing, judgment was entered against the bankrupt, execution was taken out, and a levy was made. The petitioner contended that the judgment, execution, and levy were avoided by section 67 *f* of the bankrupt act; and the question here presented concerns the effect of that subsection upon a Massachusetts attachment made more than four months before the filing,

¹ Under the act of 1841 liens by attachment were not dissolved. *Peck v. Jenness*, 7 How. 612; *Downer v. Brackett*, 21 Vt. 599. But in the latter case it was held that an attachment after notice of an act of bankruptcy by the debtor or of his intention to become a bankrupt was a fraud on the law and the lien would not be protected.

when the execution and levy were within such four months. The material part of the subsection reads as follows:—

“All levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same.”

In *Re De Lue* (D. C.), 91 Fed. 510, it was said that the provisions of section 67 *f* were limited to involuntary bankruptcy. The remark was hastily made, both counsel in that case having agreed in argument upon that construction of the section. It was clearly erroneous, and has long been treated in this district as overruled. Section 67 *f* avoids certain liens, if created within four months. This is its object. It does not avoid judgments or levies, except so far as these create a lien. *In re Kavanaugh* (D. C.), 99 Fed. 928; *In re Lesser*, 5 Am. Bankr. R. 320, 324. It releases the property affected by levies, judgments, and attachments, so far as these create a lien. Now, an attachment, in and of itself, and without further proceedings, creates a lien in Massachusetts. This has been decided by the Supreme Court of the United States in *Peck v. Jenness*, 7 How. 612. With this decision agrees that of the Supreme Court of Massachusetts, in *Davenport v. Tilton*, 10 Metc. (Mass.) 320; and if it be possible that these concurrent decisions leave a doubt in the matter, that doubt is resolved by the present bankrupt act, which itself speaks of attachments as liens. If any attachment creates a lien, then no doubt this is such an attachment. Hence, if the attachment be made more than four months before the petition is filed, the attachment and the lien which it creates are both preserved by necessary implication, as against the operation of the bankrupt act. If, therefore, the plaintiff had here permitted his suit to stand without proceeding to judgment, his attachment would necessarily have remained a lien upon the property attached until dissolved by some proceeding outside of bankruptcy. It is urged that whatever be the lien created by an attachment, standing alone, that lien cannot be enforced by judgment entered or levy made within four months of the filing of the petition. Where, however, the lien is created by the attachment, the judgment and levy create no new or additional lien, but only enforce a lien already existing. Hence, in this case, the levy and execution did not affect the property attached with a lien avoided by the bankrupt act, but only enforced a lien already existing, which lien the bankrupt act expressly protected. The meaning of the subsection appears to be this: Under some circumstances, all liens obtained through legal proceedings are avoided, in whatever part of the suit or by whatever form of proceeding they are created. If the lien is created by the levy, then the lien of the levy is avoided; if created by the judgment, then the lien of the judgment is avoided; if created by the attachment, then the lien of the attachment is avoided; but if

the lien created by the attachment is saved, that lien may be enforced by appropriate proceedings, even though such proceedings include a judgment and levy made within the limited time. I am aware that this decision is in substantial conflict with *In re Lesser*, 3 Natr. Bankr. N. 361, 108 Fed. 201. With the utmost respect for the learned and distinguished judge who decided that case, I find myself unable to agree with him. The larger part of his opinion is devoted to establishing that an attachment does not create a true lien, but the argument appears to me answered by the cases above cited, and by the express language of the subsection under consideration. Section 67 *f* declares, in substance, that an attachment is a lien, and that, if an attachment is made more than four months before the filing of the petition, the lien created by the attachment is preserved. *In re Lesser*, 5 Am. Bankr. R. 320, the Circuit Court of Appeals for the Second Circuit held that a so-called equitable lien obtained under the law of New York, by the commencement of a creditors' suit in equity, was avoided by section 67 *f*, though the creditors' bill was filed more than four months before the filing of the petition. The nature of a lien created by State law is ordinarily to be determined by the courts of the State. Doubtless the Circuit Court of Appeals correctly followed the State courts of New York in determining the effect of filing a creditors' bill. Of this so-called lien, the Court of Appeals said at page 324:—

"It is sometimes called an inchoate lien, or a contingent lien, but it is not a right in, or a right to hold, a particular article of property. It is not like the lien obtained by the attachment of personal property in an action at law by virtue of which a sheriff obtains either actual or constructive possession of the property attached, and in such a case the lien is not obtained by the judgment, but by the attachment, and we are not now prepared to say that if the judgment is rendered within four months after the petition in bankruptcy is filed that the lien by attachment is vacated."

It was urged in argument that the act of the bankrupt in failing to dissolve the attachment and permitting the sale of the property attached would be the suffering of a creditor to obtain a preference, under section 3 *a* (3) of the bankrupt act, although the attachment was made more than four months before the petition in bankruptcy was filed. *Manufacturing Co. v. Stoevers*, 38 C. C. A. 200, 97 Fed. 330. It was further argued that, if the creditor thus obtained a preference, that preference would be voidable, under section 60 *b*. It is not easy to reconcile all the language concerning preferences and liens in the bankrupt act, but the argument thus drawn from sections 3 and 60 does not appear to me strong enough to meet the language and plain implication of section 67 *f*. In *Manufacturing Co. v. Stoevers*, above cited, it was said by the Circuit Court of Appeals for this circuit:—

"In order to prevent any misapprehension, we will add that the question whether or not the attaching creditor acquired a valid lien as against these proceedings in bankruptcy is not in issue on this appeal."

The decision rendered by the referee, expressly following *In re Lesser*, 8 Nat. Bankr. N. 361, 108 Fed. 201,¹ is reversed, and the injunction issued by him is dissolved. Of course the judgment cannot be enforced against the bankrupt personally.²

IN RE KENNEY.

CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT,
DECEMBER 6, 1900.

[Reported in 105 Federal Reporter, 897.]

BEFORE LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). The questions arising upon this appeal have been quite fully discussed in the opinion of the district judge, and it seems hardly necessary to write more than an intimation that this court concurs in his reasoning and conclusions.

The facts disclosed upon the papers, chronologically stated, are these: On March 6, 1899, Clark recovered judgment against Kenney in the State court for \$20,906.66, and execution was issued on the same day. On March 15, 1899, the sheriff sold out defendant's stock of goods, which he had levied upon, for \$12,451.09. On April 13, 1899, petition in involuntary bankruptcy was filed, and Kenney was adjudged a bankrupt on July 12. The sheriff not having paid over the proceeds of the execution at the time petition was filed, he was temporarily enjoined from doing so, and subsequently, after a hearing in which Clark appeared, presented testimony, and was heard, the order appealed from was made and entered.

The question presented is, who is entitled to the \$12,451.09, — the trustee or the judgment creditor? As the district judge has clearly pointed out, the answer to this question is to be found, not in the earlier act of 1867, nor in the decisions thereon, but in the present act, which is certainly most drastic in its provisions, as will be seen from an inspection of the particular section applicable to the facts in the case at bar: —

[The court here quote Sec. 67^f].

¹ See also *Re Filer*, 108 Fed. Rep. 209, 211; *Re Johnson*, 108 Fed. Rep. 373.

² *Re Beaver Coal Co.*, 110 Fed. Rep. 630, *acc.*

Similarly, where an equitable lien is created by the filing of a creditor's bill more than four months before bankruptcy proceedings, the lien is not divested, and the suit will not be stayed. *Pickens v. Dent*, 106 Fed. Rep. 653 (C. C. A.); *Continental Nat. Bank v. Katz*, 1 Am. B. R. 19 (Superior Court, Ill.); *Reid v. Cross*, 1 Am. B. R. 34 (Superior Court, Ill.); *Taylor v. Taylor*, 45 At. Rep. 440 (N. J. Eq.). And if a decree has been rendered within the four months' period, the decree is effectual. *Doyle v. Heath*, 47 At. Rep. 213 (R. I.).

In *Ex parte Chase*, 38 S. E. Rep. 718 (S. C.), it was held that an attachment less than four months old was not dissolved when the creditor was ignorant of his debtor's insolvency, and the debtor had no knowledge of the attachment when made. But see *contra*, *Re Richards*, 96 Fed. Rep. 935 (C. C. A.).

There can be no doubt that it was the intention of Congress by this section to prohibit creditors of a bankrupt from obtaining preferences over other creditors, as the result of any legal proceedings against him, during the period of four months prior to the filing of the petition; and apt words are used to express that intention. The property of the bankrupt is safeguarded against all such proceedings by the provision that such of them as would ordinarily be liens against such bankrupt shall be deemed null and void, and the property wholly discharged and released from the same. A broad and liberal construction of the section should be adopted if necessary to effect this intent, but no strained construction is necessary in the face of language so comprehensive. Applying it to the concrete case now before us, we find that four months before petition the bankrupt had a stock of goods worth \$12,000 or more. He did not sell them, and, if nothing had happened, they would have been in his possession when his estate passed to the trustee, who might have realized the \$12,000 from them to distribute among all the creditors. How has this amount disappeared? Because Clark obtained a judgment against the bankrupt, and the sheriff under such judgment made a levy, which removed the goods from the bankrupt's estate, and turned them, through sale, into money. But, under the provisions of the bankrupt act, the judgment and the levy are to be held null and void. As a consequence, the goods have been forcibly removed, without right, from the bankrupt's possession by Clark and the sheriff, and are still to be considered a part of his estate, for the return of which the court (by explicit provision in the section) may provide summarily by order, except that the title of a *bona fide* purchaser for value shall not be interfered with. It makes no difference whether the creditor and sheriff, whose only title rests on "null and void" proceedings, hold the goods themselves or the money which represent them, nor whether, as soon as the sheriff sells under execution, it is his duty to turn over the proceeds to the judgment creditor, nor whether under the law of New York the sheriff holds the proceeds as the agent of the creditor, nor that ordinarily such proceeds would be the property of the judgment creditor. They cannot be his property in this case, because the only proceedings through which he can make out title to retain their possession are such as the bankruptcy courts must hold to be null and void.

A further objection to the granting of the order, based on an alleged partnership between the bankrupt and a person who put some money in the business, is sufficiently discussed in the opinion of the district judge. The order of the District Court is affirmed.¹

¹ In *Lavor v. Seiter*, 69 N. Y. Supp. 987, the Supreme Court of New York, Special Term, held that when not only execution had been levied but the proceeds distributed, the case was within section 67*f*. On the other hand in *Re Seebold*, 105 Fed. Rep. 910, the Circuit Court of Appeals for the Fifth Circuit decided that the court of bankruptcy could not make a summary order against a sheriff holding under the order of a State court for the delivery of proceeds of property sold under a judgment; and in

SECTION IV.

DIFFERENT KINDS OF PROPERTY.

CARPENTER AND OTHERS v. MARNELL.

COMMON PLEAS, HILARY TERM, 1802.

[Reported in 3 Bosanquet and Puller, 40.]

ASSUMPSIT on a note in these words: "I promise to pay to Mr. Joseph Fowler or order the sum of £150, being the remainder of the consideration for the assignment of his interest in the Layton business to me, as soon as I shall receive or may receive the money due upon the completion of the said business from T. B. Esquire, his executors, administrators, or assigns, or immediately upon my receiving letters of administration of the estate and effects of Lieutenant-General Joseph Walton, otherwise Brome, deceased, whichever event shall first take place. Signed "Richard Marnell." This note was indorsed by Fowler to one J. Bagster for a valuable consideration, after which Fowler became bankrupt and the plaintiffs were chosen his assignees; in which capacity they now sued for the benefit of Bagster.

The cause was tried before Lord ALVANLEY, C. J., at the Westminster Sittings after Michaelmas Term, and a verdict was found for the

Doyle v. Hall, 86 Ill. App. 163, it was held that delivery of the execution to the officer effected an indefeasible lien.

Under the Act of 1867 a creditor acquired an indefeasible right if levy of execution was made before the beginning of bankruptcy proceedings. *Marshall v. Knox*, 16 Wall. 551, 559; *Wilson v. City Bank*, 17 Wall. 473; *Goddard v. Weaver*, 1 Woods, 257; *Re Tilla*, 11 B. R. 214; *Re Shirley*, 9 Fed. Rep. 901; *Howe v. Union Ins. Co.*, 42 Cal. 528. And if local statutes gave an indefeasible lien to the delivery of the execution to the officer, this lien prevailed over the assignee. *Re Paine*, 9 Ben. 144; *Re Stockwell*, 9 Ben. 265; *Re Weeks*, 2 Biss. 259; *Bartlett v. Russell*, 4 Dill. 267; *Re Hull*, 14 Blatch. 257; *Re Wheeler*, 18 B. R. 385; *Crane v. Penny*, 2 Fed. Rep. 187. See also *Henkelman v. Smith*, 42 Md. 164. Similarly under State statutes. *Nason v. Hobbs*, 75 Me. 396; *Hall v. Crocker*, 3 Met. 245; *Hall v. Hoxie*, 3 Met. 251; *Cushing v. Arnold*, 9 Met. 23; (*conf.* *Wright v. Morley*, 150 Mass. 513). See also *Elliott v. Warfield*, 122 Cal. 632. As to the Act of 1841 see *Re Cook*, 2 Story, 376; *Fiske v. Hunt*, 2 Story, 582; *Re Rust*, 21 Fed. Cas. No. 12,171.

Even though a State statute provide that an attaching creditor "shall be deemed a purchaser in good faith" an attachment within four months is dissolved. *Re Kaupisch Creamery Co.*, 107 Fed. Rep. 93.

If a judgment is entered within four months on a judgment note or warrant of attorney, the lien of the judgment is dissolved though the note or warrant of attorney was given more than four months before. *Re Richards*, 96 Fed. Rep. 935 (C. C. A.); *Ferguson v. Greth*, 195 Pa. 272.

The lien of a judgment is not preserved merely because the action was begun more than four months before the bankruptcy. *National Bank & Loan Co. v. Spencer*, 53 N. Y. App. Div. 547.

Only the trustee can assert that a lien acquired by a process of law is void. *Frazee v. Nelson*, 61 N. E. Rep. 48 (Mass.).

plaintiffs subject to the opinion of the court whether the action was maintainable by them as assignees of Fowler.

A rule *nisi* having been obtained on a former day for setting aside the verdict, and entering a nonsuit,

Best and *Onslow*, Serjts., now showed cause.

Shepherd, Serjt., *contra*.

LORD ALVANLEY C. J. We are all of opinion that this action ought to have been brought by Fowler. He was the person to whom the promise to pay was made; he by his indorsement directed the contents of the note to be paid to Bagster, and though this indorsement had no legal effect, yet it passed the beneficial interest in the note to Bagster, and Fowler by the indorsement became a mere trustee for him. The assignees never were in a situation to derive any benefit from this piece of paper. If indeed they had possessed the most remote possibility of interest, or if they could state anything from which a benefit to the creditors would result, I should hold that the action might be maintained; but at the time when they brought this action it was impossible for them not to know that they had no right to the note. They bring the action in the character of trustees; but they are not trustees for Bagster; they are only trustees for Fowler's creditors, and therefore cannot sustain this action.

HEATH, ROOKE, and CHAMBER, JJ., concurred.

*Rule absolute.*¹

YEATMAN v. SAVINGS INSTITUTION.

UNITED STATES SUPREME COURT, OCTOBER TERM, 1877.

[Reported in 95 *United States*, 764.]

ERROR to the Circuit Court of the United States for the District of Louisiana.

On the 22d of July, 1871, O'Fallon & Hatch, a firm doing business at St. Louis, delivered, in pledge, to the New Orleans Savings Institution, a corporation created by the laws of Louisiana, having its place of business in New Orleans, two certificates of indebtedness issued by that State, each for the sum of \$5,000, to secure the payment of a promissory note of the firm for \$5,000, dated July 21, 1871, made payable to its own order on the 21st of January, 1872, and by it indorsed

¹ *Winch v. Keeley*, 1 T. R. 619; *Gladstone v. Hadwen*, 1 M. & S. 517; *Dangerfield v. Thomas*, 9 A. & E. 292; *Ex parte Gennys*, Mont. & McA. 258; *De Mattos v. Saunders*, L. R. 7 C. P. 570; *Pratt v. Wheeler*, 6 Gray, 520; *Faxon v. Folvey*, 110 Mass. 392; *Holmes v. Winchester*, 133 Mass. 140; *Low v. Welch*, 139 Mass. 33; *Ontario Bank v. Mumford*, 2 Barb. Ch. 596; *Kip v. Bank of New York*, 10 Johns. 63; *Swepton v. Rouse*, 55 N. C. 34; *Ludwig v. Highley*, 5 Pa. St. 132; *Blin v. Pierce*, 20 Vt. 25 *acc.*; and see *Ames Cas. Trusts*, 392 and note.

in blank. It is conceded that the corporation acquired the note and the certificates of indebtedness in due course of business, and for a valuable consideration. The firm and the individuals composing it were, November 27, 1871, adjudged bankrupts by the District Court of the United States for the Eastern District of Missouri; and, upon the application of creditors, a receiver of the estate and effects of the bankrupts was, by an *ex parte* order, appointed, with authority to demand and receive all property of every kind and description belonging to them.

An assignee in bankruptcy was afterwards appointed, to whom was conveyed, in the prescribed mode, all the real and personal estate of the bankrupts. First the receiver, and subsequently the assignee, each claiming to act under the authority of that court, demand[ed] of the corporation, in the city of New Orleans, the surrender of the certificates. That demand, repeated more than once, and accompanied by copies of the orders of that court, was uniformly met with a refusal to surrender them, except upon the payment of the note for which they had been pledged. The corporation, by its president, expressed its willingness to surrender them, or have them sold, if an amount sufficient to pay the note was left in New Orleans, with the agent of the receiver and assignee, until proof of its debt should be made in the bankruptcy court. Neither the receiver nor the assignee assented to such an arrangement, but insisted upon the right to the actual custody of the certificates pending the proceedings in bankruptcy. The assignee, upon one occasion, authorized the president of the corporation to sell them, at not less than sixty-eight cents on the dollar, and retain the proceeds, without prejudice to the rights of either party, until the claim of the institution should be proven before a register in bankruptcy, and allowed. But a sale could not be made at that limit, and the authority to sell was withdrawn.

The corporation did not become a party to the proceedings in bankruptcy by proving its debt, or in any other mode.

This action by the assignee in bankruptcy, to recover of the corporation the value of the certificates, was based upon the ground that, by its refusal to surrender possession of them, it had converted them to its own use, and become liable therefor.

The corporation insisted that, having obtained the certificates in due course of business, and for a valuable consideration, it was entitled to hold them until the note should be fully paid.

There was a finding in favor of the corporation; and, judgment having been rendered thereon, Yeatman sued out this writ of error.

Mr. *Given Campbell*, for the plaintiff in error.

Mr. *Thomas Allen Clarke*, for the defendant in error.

Mr. Justice HARLAN delivered the opinion of the court.

Counsel for the plaintiff in error has raised numerous questions for our consideration, which, under the view we take of the case, it is not necessary to determine. The sole question which, under the pleadings,

it seems essential to decide, is, whether the savings institution, by its refusal to surrender the certificates, can be held to have converted them to its own use.

We are of opinion that this question must receive a negative answer. The savings institution, by virtue of the pledge, acquired a special property in the certificates, and, until the payment of the note for \$5,000, was not bound to return them either to the bankrupt, the receiver, or the assignee in bankruptcy. Such are, beyond doubt, its rights at common law, as well as under the Code of Louisiana, which declares that "the creditor who is in possession of the pledge can only be compelled to return it when he has received the whole payment of the principal as well as the interest and costs." Rev. Code La., § 3,164.

These rights were not affected by any of the provisions of the bankrupt law. The established rule is, that, except in cases of attachments against the property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens, or incumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupt. *Brown v. Heathcote*, 1 Atk. 160; *Mitchell v. Winslow*, 2 Story, 630; *Gibson v. Warder*, 14 Wall. 244; *Cook v. Tullis*, 18 Wall. 332; *Donaldson, Assignee, v. Farwell et al.*, 93 U. S. 631; *Jerome v. McCarter*, 94 U. S. 734. He takes the property in the same "plight and condition" that the bankrupt held it.¹ *Winsor v.*

¹ Illustrations of this principle are found in *Heritable Reversionary Co. v. Millar*, [1892] A. C. 598; *Sawyer v. Turpin*, ante 333; *Stewart v. Platt*, 101 U. S. 731; *Laughlin v. Calumet, etc., Dock Co.*, 65 Fed. Rep. 441; *Re Wright*, 96 Fed. Rep. 187; *Hardin v. Osborne*, 94 Ill. 571; *Smythe v. Sprague*, 149 Mass. 310; *Brown v. Brabb*, 67 Mich. 17; *Martin v. Bowen*, 51 N. J. Eq. 452 (see *Re New York Economical Printing Co.*, 110 Fed. Rep. 514; *Re Tatem*, 110 Fed. Rep. 519; *Re Ronk*, 110 Fed. Rep. 154; *Asbury Park Association v. Shepherd*, 50 At. Rep. 65 (N. J. Eq.)), where an unrecorded deed of the debtor was held good against his assignee or trustee in bankruptcy in the absence of fraud; *Pease v. Ritchie*, 132 Ill. 647, where the right of an execution creditor to redeem property sold under a prior execution was held to exist also against the assignee; *Re Dunkerson*, 4 Biss. 227, where a lien of a bank, given by its by-laws, against a bankrupt's stock in the bank was held not to be lost by the stockholder's bankruptcy; *Montgomery v. Bucyrus Works*, 92 U. S. 257; *Donaldson v. Farwell*, 93 U. S. 631; *Davis v. Stewart*, 8 Fed. Rep. 803; *Jaffrey v. Brown*, 29 Fed. Rep. 476; *Fecheimer v. Baum*, 37 Fed. Rep. 167; *Re Gany*, 103 Fed. Rep. 930; *Laughlin v. Reed*, 89 Me. 230, where property obtained by fraud by the debtor was recovered from his assignee or trustee in bankruptcy; *Philadelphia v. Eckels*, 98 Fed. Rep. 485; *Perth Amboy Gas Light Co. v. Middlesex County Bank*, 45 At. Rep. 704 (N. J. Eq.); *Blair v. Hill*, 50 N. Y. App. Div. 33, and cases cited in *Ames Cas. Trusts*, 12 n., where the assignees or receivers of a bank, which, with knowledge of its insolvency (and therefore fraudulently), had accepted a deposit; *Re McKay*, 1 Low. 345, where an estoppel against the bankrupt was enforced against his assignees. See also *Jewson v. Moulson*, 2 Atk. 417, 420; *Bosvil v. Brander*, 1 P. Wms. 459; *Mitford v. Mitford*, 9 Ves. 87; *Garratt v. Sharratt*, 10 B. & C. 716; *Winsor v. McLellan*, 2 Story, 492; *Ex parte Newhall*, 2 Story, 360; *Strong v. Clawson*, 10 Ill. 346; *Jenkins v. Pierce*, 98 Ill. 646; *Holmes v.*

McLellan, 2 Story, 492. In *Goddard v. Weaver*, 1 Wood, 260, it was well said that the assignee "takes only the bankrupt's interest in property. He has no right or title to the interest which other parties have therein, nor any control over the same, further than is expressly given to him by the Bankrupt Act, as auxiliary to the preservation of the bankrupt estate for the benefit of his creditors. It would be absurd to contend that the assignee in bankruptcy became *ipso facto* seised and possessed in entirety, as trustee, of every article of property in which the bankrupt has any interest or share."

These views find direct support in more than one provision of the Bankrupt Act. Among the rights which vest at once in the assignee by virtue of the adjudication in bankruptcy, and of his appointment as such assignee, is the right to redeem the property or estate of the bankrupt. Act of 1867, § 14; Rev. Stat., § 5,046. And, in order that it may be exercised for the benefit of creditors, the assignee is given express authority, "under the order and direction of the court, to redeem and discharge any mortgage or conditional contract, or pledge, or deposit, or lien upon any property, real or personal, whenever payable, and to tender due performance of the condition thereof, or to sell the same subject to such mortgage, lien, or other incumbrance." Act of 1867, § 14; Rev. Stat., § 5,066. This is a distinct recognition of the rights of the pledgee as against the assignee. Of course, where the pledge is in fraud of the bankrupt law, and consequently void, the assignee may disregard the contract of pledge, and recover the property for the benefit of creditors. Not so where the pledge, as in this case, was made in good faith, for a valuable consideration, and not in violation of the provisions of the bankrupt law.

The savings institution, therefore, incurred no liability by its refusal to surrender the certificates upon the demand of the receiver or the assignee. Such refusal affords no evidence of a conversion of them to its use.

Nor was its right to hold them impaired by its failure to appear in the bankruptcy court, or its refusal to prove its debt, in the customary form, against the estate of the bankrupts. The only effect of such refusal was to lose the privilege of participating in such distribution of the estate as might be ordered by that court. It had the right to forego that advantage, and look for ultimate security wholly to the certificates which it held under a valid pledge. If the assignee regarded them as of greater value than the debt for which they had been pledged, or if the interest of the creditors required prompt action, he had authority, under the statute and the orders of the court, to tender performance of the contract of pledge, or to discharge the debt for which the certificates were held. He had the right, perhaps, under the orders of the

Winchester, 133 Mass. 140, and cases cited *ante* note 1, p. 338, and in *Ames Cas. Trusts*, 392, n. As to the doctrine of stoppage in transitu, which may cut off or qualify the rights of a trustee in bankruptcy to property purchased by the bankrupt, see *Mechem on Sales*, §§ 1524-1517.

court, to sell them, subject to the claim of the defendant in error. If he desired a sale of them, and a distribution of the proceeds, or if he doubted the validity of the pledge, he could have instituted an action against the corporation in some court of competent jurisdiction in Louisiana, and thereby obtained a judicial determination of the rights of the parties. But none of these obvious modes of proceeding were adopted. The receiver and assignee seem to have acted throughout upon the theory that they had the right, immediately upon and by virtue of the adjudication in bankruptcy, to assume control of all property of every kind and description, wherever held, in which the bankrupt had an interest, without reference either to the just possession of others, lawfully acquired, prior to the commencement of proceedings in bankruptcy, or to the liens, incumbrances, or equities which existed against the property at the time of the adjudication in bankruptcy. We have seen that such a theory is unsupported by law.

The conclusions we have announced render it unnecessary to consider any other questions raised in the case.

*Judgment affirmed.*¹

T. F. NUTTER v. J. S. WHEELER ET AL.

DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS,
NOVEMBER, 1874.

[Reported in 2 Lowell, 346.]

ACTION of contract by the assignee in bankruptcy of A. S. Gear to recover \$627, alleged to have been received by the defendants to the use of the plaintiff. The case was, by consent, tried by the court without a jury. The facts, as found by the judge, were these:—

The defendants were manufacturers of machinists' tools at Worcester, and Gear had a shop in Boston, where he sold such tools, among other things. The defendants were in the habit of sending their manufactured goods to Gear, and he sold them at such prices and to such persons and on such terms as he pleased, not less than the trade prices fixed by the defendants; whenever he had sold any tools, and not before, he was to pay the defendants; in thirty days, the prices shown in the list, less an agreed discount. The defendants had the right to sell any goods which at any time remained in his shop unsold, and he was permitted to sell any of their goods at the factory, and the defendants would then deliver them according to his order, and charge him with the trade price less the discount. Instead of paying in thirty days,

¹ Jerome v. McCarter, 94 U. S. 734; Stewart v. Platt, 101 U. S. 738; Hauselt v. Harrison, 105 U. S. 401; Re Buntrock Clothing Co., 92 Fed. Rep. 886; Crowe v. Reid, 57 Ala. 281; Hall v. Bliss, 118 Mass. 554; Dayton Nat. Bank v. Merchants' Nat. Bank, 37 Ohio St. 208, acc. But see Re Cobb, 96 Fed. Rep. 821.

Gear would sometimes give his note for the balance due; and the defendants held one such note at the time of the bankruptcy.

In December, 1873, Gear ordered three drills to be sent by the defendants, from their factory at Worcester, to the New York Central Railroad Company, at three different machine shops of that company, in the State of New York. They were sent, and a bill was made out to Gear, as the purchaser, for the trade price of \$600, less fifteen per cent, and sent him in a letter, in which the defendants say they had taken off fifteen per cent, and hope to get the cash in thirty days.

In January, 1874, Gear failed, and the defendants took back the tools of their manufacture then in the shop in Boston, unsold. In February, 1874, Gear went into bankruptcy, and at the first meeting of creditors the defendants proved against his estate for the amount of his note, above mentioned, and for the price of the three drills. J. S. Wheeler, one of the defendants, was chosen assignee. Finding that the railroad company had not paid Gear for the drills, the defendants collected the price, giving to the company the receipt of J. S. Wheeler, the assignee. Wheeler afterwards resigned his trust as assignee. This suit was brought by the successor of Wheeler, as assignee, against the firm of J. S. Wheeler & Co., for money had and received. The defendants filed a petition to amend their proof, as having been made by mistake of fact and law.

E. Avery & T. F. Nutter, for the plaintiff.

N. Morse & A. Jones, for the defendant.

LOWELL, J. It has been settled for a very long time that, upon the bankruptcy of a factor, his principal may recover from the assignees any of the goods remaining unsold, or any proceeds of the sale of such goods which the assignees themselves have received, or which remain specifically distinguishable from the mass of the bankrupt's property. The action may be brought at law as well as in equity, subject, of course, to the factor's lien for advances or commissions: *Scott v. Surman*, Willes, 400; *Ex parte Chion*, 3 P. Wms. 187 n.; *Kelly v. Munson*, 7 Mass. 319; *Tooke v. Hollingworth*, 5 T. R. 215; and it makes no difference that the factor acted under a *del credere* commission, or sold the goods in his own name: *Thompson v. Perkins*, 8 Mason, 232; *Barry v. Page*, 10 Gray, 398; *Audenried v. Betteley*, 8 Allen, 302.

A like doctrine is applied to bankers who, if they have received notes or bills from their customers and have not discounted them, will not usually be held to have acquired the property in them; and if the banker becomes bankrupt, his assignees are liable to the customer for the bills, or their distinguishable proceeds, subject to the lien for advances: *Thompson v. Giles*, 2 B. & C. 422; *Ex parte Barkworth*, 2 DeGex & J. 194; *Stetson v. Exch. Bank*, 7 Gray, 425.¹

The important question, therefore, in this case is, whether the defendants and Gear stood in the positions, respectively, of principal and agent in this transaction of the sale of three drills. Upon the first

¹ See Ames' Cas. Trusts, 9-21, for many cases illustrating this principle.

view of the correspondence and the acts of the parties, it appears a simple case of sale to Gear of goods delivered to a third person at his request. And the defendants found some difficulty in stating their case in such a way as to take it out of this category. In their application to withdraw this part of their proof in bankruptcy, they say it ought to have been put, not as a sale, but as a consignment or delivery of the drills to Gear, or his order, for sale by him on their account, on commission. It was not a consignment, certainly, and Gear never for an instant had the possession or property, general or special, of the goods.

The defendants, however, appeal to the course of business between the parties to prove that it was a sale on commission. The bankrupt and the defendants, being examined as witnesses, disagreed about the conversation which took place at the beginning of the business connection between them; but the very voluminous correspondence shows clearly enough what the actual mode of dealing was. And it is plain that the goods sent to Boston by the defendants, from time to time, remained their property until they were sold, and that when a sale occurred Gear became immediately the debtor at a fixed price, and was bound to pay at a definite time, and that he never consulted with them about terms or purchasers, or anything else, except the variations of the trade price; never accounted to them or was expected to account as agent, or was subject to their directions, excepting as to the tools remaining in his hands undisposed of. As to those goods sent to Boston, he may be described as a bailee, having power to sell as principal. Until a sale was made, the property in the goods remained in the defendants, and they were well justified in reclaiming those which remained on hand at the time of the failure of Gear.

But after the goods were sold, the agreement appears to have been that Gear's credit only was looked to. Perhaps there were conveniences in this mode of conducting the business. Whatever profit or loss Gear might make, or whatever credit he might give, the defendants had a fixed price and a fixed time of payment. He never consulted them about his sales, or rendered any account of sales. The prohibition against selling below the trade price is a very common one between a manufacturer and those who buy of him to sell again, and is intended to prevent a ruinous competition between sellers of the same article. I have often known this arrangement to be made by a patentee and his various licensees. It has but little tendency to prove agency.

The question of agency is mooted usually either between the principal and the third person, or between that person and the supposed agent; but the real inquiry in all the cases is, whether the credit was given to the person sought to be charged by the person seeking to charge him. Thus, when the defendants were suing the railroad company, the liability depended on the fact of credit having been given them by the defendants, either directly or through their agent Gear.

The terms of the sale by Gear to the company were not proved, but it was taken for granted by both parties that he sold as a principal; and that this was so, is shown by the fact that the company insisted upon the receipt of his assignee.

I will now examine some adjudged cases. Where a trader, having a contract with government to supply a large amount of candles, asked a friend, who had candles of the required quality, to accommodate him with some, which the friend assented to, provided the bills should be made out in his name; and the trader delivered the candles (as the court inferred) in his own name, and his assignees in bankruptcy received the price; it was held they must pay it in full to the owner of the candles; *Ex parte Carlon*, 4 Dea. & Ch. 120. But it was taken for granted by the judges that if the owner had intended to trust the trader's credit, he could not have intervened after the bankruptcy, but must have proved against the assets as for goods sold.

So, in the cases about bankers, it has been said that if the agreement were that the bills should be the property of the banker, then, whatever might be the hardship of the particular case, his assignee in bankruptcy could hold them. See remarks of Eldon, L. C., in *Ex parte Sergeant*, 1 Rose, 153, explained in *Ex parte Barkworth*, 2 DeGex & J. 194.

The late English case, *Ex parte White*, L. R. 6 Ch. 397, is on all fours with this. With a change of names, the course of dealing described in that case would do for this, in respect to the goods sent to Gear and sold by him in Boston; and the precise question came up, whether, after the goods had been sold, the bankrupt was to account as agent. The court decided that the agency continued only up to the time of selling the goods; and when they were sold, the bankrupt himself became the purchaser, as between him or his assignees in bankruptcy and the consignor of the goods. The learned justices say that this mode of conducting business is a usual one, of great convenience to the parties, and they carefully and ably distinguish the contract from one of a sale by an agent, even with a *del credere* commission. That case was to be taken to the House of Lords, but I cannot find that it has been decided there. Whatever may be its fate in that court, I consider the decision of the lords justices a sound one.

The case of *Audenried v. Betteley*, 8 Allen, 302, has been cited by the defendants. There the plaintiffs agreed to "stock" the wharf of the bankrupt with coal and wood, and the bankrupt was to make sales at prices fixed by the plaintiffs. He agreed to carry on no other business; to keep books which should always be open to the inspection of the plaintiffs; to guarantee the sales; to account monthly, etc. The contract was evidently drawn with a view to keep the whole business under the plaintiffs' control, without making them liable for the debts of the bankrupt; and in providing for these objects it ran some risk of making the bankrupt a mere purchaser. But the court held that he was an agent. That case differs from the case at bar as much as the English

case resembles it. Here none of the circumstances are found from which an agency was there inferred. Gear did not render an account of sales; did not agree to guarantee sales, nor to keep books, nor to sell at prices to be fixed by the defendants, excepting as to the minimum, which has been already explained.

If the relation of the parties was such as I have considered it, then, even as to the goods which had once been consigned to Gear, he should be considered as the purchaser, subject only to the understanding that he was neither the owner of them, nor liable to pay for them until he had succeeded in finding a purchaser; but when he did sell he immediately became the principal, and the defendants ceased to have the rights of a consignor, and could not follow the goods or their proceeds as undisclosed principals.

If this is so, then the transaction now under review, which, standing alone, appears to be a sale to Gear himself, and not a sale through him as agent, is not shown to be anything else by the course of trade between the parties. But even if the goods which had once been consigned to Gear should be held to be sold by him as agent or factor, I doubt if such sales as this could be so considered.

The defendants, then, have collected money which belonged to the estate of Gear. They collected it by action; but as they had no right to collect it, they cannot deduct the expenses, unless they would have been necessary and proper costs of a recovery by the assignee if he had brought the action. In the settlement with the railroad company they were obliged to give the receipt of one of the firm as assignee, and there is no evidence that he could not have had the money in the first instance upon such a receipt. The expenses, therefore, were incurred in their own wrong. They must pay to the present assignee the price the railroad gave for the drills, which I understand to be \$610.

?

Judgment for the plaintiff.

IN THE MATTER OF SIMON MOSES.

DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,
MARCH 4, 1880.

[Reported in 1 Federal Reporter, 845.]

CHOATE, J. This is an application on the part of creditors of the bankrupt, by petition, to compel the bankrupt to deliver to the assignee certain moneys and property alleged to be in his possession at the time of filing his petition in bankruptcy and not delivered to his assignee. The bankrupt has answered, denying that he had any such money or property; but he now objects to any further proceedings, and moves to dismiss the petition on the ground that, upon the case as stated in the

petition, the assignee in bankruptcy has no title or claim to the property, but that, if the bankrupt still holds it, it belongs to his assignee under a voluntary assignment for the benefit of creditors, executed before the filing of the petition in bankruptcy.

The case made by the petition is shortly this: The general assignment for the benefit of creditors was executed December 19, 1877. The petition in bankruptcy was filed June 27, 1878. At and prior to the making of the general assignment, the bankrupt had a large amount of money and personal property, which, with the knowledge and connivance of his voluntary assignee, and to defraud his creditors, he was permitted to use as his own in continuing his business. That part of his property, if any, which he did deliver to the voluntary assignee was delivered in form only, and really remained subject to the control and use of the bankrupt in his business, the assignee permitting the money to be deposited in a bank account opened in his name as assignee, and to be drawn out by or for the use of the bankrupt, and for the bankrupt's own business purposes. The bank account of the assignee was, on the case made, a mere blind for creditors.

This state of things continued till the assignee died, having rendered no account, and having to his credit in the bank only about \$500. A new assignee has, since his death, been appointed by the court having jurisdiction of the trust, on the application of the present petitioners. The moneys and property now alleged to be in the hands of the bankrupt are the proceeds and result of the business so carried on, or, perhaps, partly the very money which the bankrupt failed to deliver to his voluntary assignee.

Upon this case I am clearly of opinion, if the facts shall be established by the evidence, that the bankrupt should be compelled to pay over and deliver the money and property to the assignee in bankruptcy. Whatever money or property is in the possession of the bankrupt at the time of filing his petition, which he is actually using and holding as his own, passes to his assignee in bankruptcy, and he cannot set up in defence to the claim of the assignee a title in a third person, merely for the purpose of holding it himself. If third persons have the possession, this court cannot, on summary petition, order it to be delivered to the assignee. But if the bankrupt has it, it passes to the assignee, subject to the liens or rights of third persons, whatever they may be. After the assignee gets the property, any third person may, by petition or suit, assert his rights in it.

If the bankrupt has property which he is using as his own, the court will not be curious to inquire how he came by it. The case of *In re Beal*, 2 N. B. R. 587, is directly in point, and was not so strong a case for the creditor as the present. In that case Judge Lowell says: "The question is one of fact whether this bankrupt had, at the time of his bankruptcy, any estate or effects which he has concealed. If he had such *de facto*, though by a defeasible title, he must set them out in his schedules, and give them to his assignee. It is not for him to rely

on the title of a third person which he has not himself respected. The presumption is that he surrendered all his property in 1866; but that is a presumption of fact; and if he did not, it is not important whether his motives were good or bad; whether his acts were done with the consent or concurrence or against the will of his then assignees, and in fraud of their rights. The possession of assets, in the use and enjoyment of the bankrupt, makes a sufficient title for his assignee, until the earlier assignees shall dispute it."

Let an order be entered referring it to the register to take the proofs.¹

9 insert 397 - 196 - 516
 402 - 179 mans 120
 403 - 201 - 344
 406 SQUIRE COMPTON 618
 410 IN CHANCERY, EASTER TERM 1724 5-85-

[Reported in 9 Viners's Abridgment, 227, plac. 60.]

O. 2nd THE question was, if assignees of commissioners of bankruptcy by taking an assignment of a mortgage term prior to the title of dower shall protect their estate from dower.

It was insisted that creditors and assignees of commissioners of [a] bankrupt stand only in the place of the bankrupt; and since such an assignment to the bankrupt himself or heir would not protect the estate from title of dower in the hands of the heir, neither will it protect the estate in the hands of the creditors of the bankrupt or the assignee of the commissioners, and this differs the present case from the case of Lady Radnor and Vandebendy in Dom. Proc., where it was held that such a prior term should protect the estate from dower in the hands of a purchaser, — *nota differentiam*. Decree that the plaintiff be let into her dower, keeping down the interest of a third part of the mortgage.²

¹ *Re Vogel*, 7 Blatch. 18, acc.

² *Smith v. Smith*, 5 Ves. 189; *Porter v. Lazear*, 109 U. S. 84; *Re Angier*, 4 B. R. 619; *Re Hester*, 5 B. R. 285. But see *contra*, *Hill v. Bowers*, 4 Heisk. 272.

IN RE MCKENNA.

DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE,
SEPTEMBER 30, 1881.

[Reported in 9 Federal Reporter, 27.]

HAMMOND, D. J. . . . Whether the estate that the bankrupt had in the land of his wife at the date of the filing of his petition in bankruptcy passed to his assignee depends upon a proper construction of the Tennessee statute. T. & S. Code, §§ 2481, 2482. At common law he was, on that date, a tenant by the curtesy initiate, and about the character of that precise estate there has been much conflict in the books, and much confusion. I do not, from authorities consulted, find that it has been ever settled or agreed upon whether the husband, before or after issue born, is in possession of his estate by virtue of this tenancy, or that which he has by virtue of the marriage, considered irrespectively of the birth of issue, or the possibility of such birth. Often it is unimportant whether he is in by the one or the other, but in the conflicts that arise over marriage settlements, grants to the wife by deed or will, the statute of limitations, dissolutions of the coverture by divorce, and the effect of conveyances by the husband and the wife, one or both, the nature of this tenancy by the curtesy initiate has been freely discussed, but in some respects remains unsettled. Too much force is sometimes given to the death of the wife, and even to the birth of issue, when either is thought to originate this estate by the curtesy, and it is sometimes said, as it is argued in this case, that prior to the death of the wife it is a possibility only, — something like the *spes successionis* of the heir apparent or presumptive to an estate, that does not pass to a voluntary assignee, or to an involuntary assignee, by operation of law. This is not true of the estate at any period from the moment of marriage and seizin of the wife down to the consummation of the estate, if issue be born, by her death.

Whether, before seizin by the wife, a husband's possible curtesy in lands belonging to the wife would be assignable, in law or in equity, by treating the conveyance as a covenant to assign, or not, certainly, from the very moment of such seizin, he becomes a tenant by the curtesy, and that is undoubtedly the initial point at which this estate in the particular land vests in him, no matter whether it originates in the seizin or the marriage relation. And from that moment, although he may be in possession by virtue of the marital right, or *jure uxoris*, as it is sometimes called, he is also in possession by virtue of this estate by the curtesy, if the two be separable at all. Some of the authorities say he is in by both by a kind of remitter, and possibly they may in some sense be said to unite or merge into each other, though neither will destroy or absorb the other. But, whatever the distinctions may be in this regard, and however for all purposes this matter may be

determined, for the purpose of giving effect to his conveyances, and for the purpose of being subjected to his debts, it is vested in him whenever the necessary seizin of the wife occurs. If he convey, or it be assigned by operation of law after seizin, even before issue born, the estate by the curtesy passes, and his assignee holds, as he held it, subject to be divested by the failure of issue occurring by the death of the wife without having given birth to a child born alive; or, whether issue be born or not, by the death of the husband terminating the estate in the life-time of the wife; and in some peculiar circumstances, perhaps, by other events. The mistake is often made of supposing that the survivorship of the wife defeats the tenancy by the curtesy. Her survival has no such effect. His death terminates his life estate necessarily, whether it occurs before or after that of the wife. But it does not follow that this defeasible and determinable character of the estate reduces it to a bare possibility, or makes it an estate called into being by the happening of a contingency — either that of the birth of issue or the death of the wife in the life-time of the husband. The husband has, at best, only a life estate, and of course his death ends it, whether it happens before or after the death of the wife; and what the books mean by saying that her death consummates this tenancy by the curtesy is that from that time on there is no marital relation furnishing him any other right to possession or ownership of her lands than that which he has derived through this curtesy of the law. The death of the wife neither originates nor vests the estate, but only consummates or makes perfect that which had been before originated and vested. I shall not here critically examine the authorities consulted on the general character of this estate with a view of determining the exact scope of our statute, because, whatever may be that character, it is too well settled that it may be conveyed by the husband, may be sold under *fi rei facias*, and passes to an assignee in bankruptcy, to require more than a citation of some of the cases on that point. *Gardner v. Hooper*, 3 Gray, 398; *Vreeland v. Vreeland*, 1 Green, N. J. Eq. 513; *Boykin v. Rain*, 28 Ala. 332; *Day v. Cochran*, 24 Miss. 261; *Schermerhorn v. Miller*, 2 Cow. 439; *Gibbins v. Eyden*, L. R. 7 Eq. 371; *Morgan v. Morgan*, 5 Madd. 408; *Follett v. Tyrer*, 14 Sim. 125; *Cooper v. Macdonald*, L. R. 7 Ch. Div. 288; 1 Bish. Mar. Wom. § 489; *Hill. Bankruptcy* (2d ed.), 112, § 14. And in *Kesner v. Trigg*, 98 U. S. 50, no question was made but that the assignee took the estate by the curtesy. The same principle is found in *Re Bright*, L. R. 13 Ch. Div. 413, where a fund of personal estate was settled on the mother for life, and after her death on the children of the marriage, and it was held that the assignee in bankruptcy of one of the children took his share, though the life tenant did not die for nearly ten years after the bankruptcy.

Has our statute changed this result? I think not. Standing alone, section 2481 of the Code would exempt the whole estate of the husband from liability for his debts, and, as a consequence, by operation of the bankruptcy act itself (Rev. St. § 5045), it would not pass to the

assignee. But section 2482 of the Code operates to restrict the quantity of the husband's estate that is exempt to so much of it as is measured by his wife's life. He holds the estate for his own life, and it is exempt from execution for the life of another, and therefore not necessarily for his own life. He asks here too much — more than this statute in terms gives him — when he claims exemption for the whole estate by the curtesy coextensive with his own life. That the statute has not abridged his common-law estate by limiting it to the life of his wife is plain, because he claims it after her death, and during his own life, and this he can do only on the theory that the statute has not interfered with his common-law estate in this land in regard to its quantity. If the statute has preserved to him his tenancy by the curtesy it has preserved it to his creditors, because the statute only cuts them off during the life of the wife.

It has been said in the books that a tenancy by the curtesy stands somewhat as if the wife had made a lease of the land to her husband for his life, the reversion being in her or her heirs. Now, out of this estate of the husband the statute carves a portion which it exempts from execution, and that portion does not pass to an assignee in bankruptcy; not because of any peculiarity in the estate itself as being unassignable, but because the bankruptcy laws have in terms declared that property so exempt shall not pass to the assignee. It cannot, then, I think, be successfully claimed that the portion which we may call a surplus remaining after the wife's death is also exempt.

The next argument to be considered is that the estate now enjoyed by the husband is subsequently acquired property coming to him on the death of his wife, happening since the petition in bankruptcy was filed. This, to my mind, involves a total misapprehension of the nature of the estate of tenancy by the curtesy, and can only be sustained on the theory that the statute has created a new kind of estate for the husband in his wife's lands, or, rather, two estates. One of these, which he enjoys during her life, and in the enjoyment of which he was when the petition in bankruptcy was filed, is claimed as exempt property; and, as to the other, that it was created for him, or was called into existence by the death of the wife happening since the bankruptcy. During his wife's life this latter estate, it is argued, was a mere possibility which did not pass. The case of *Jackson v. Middleton*, 52 Barb. 9, is very much relied on to sustain this position. It should be read in connection with *Moore v. Littel*, 40 Barb. 488; 8 Am. Law Reg. (N. S.) 144, where the same deed was construed. There was a deed to John Jackson for his life, and after his death to his heirs and their assigns. It was held that during the life of the life tenant the heirs had "an alienable contingent estate in remainder," and that this estate, under a New York statute which subjected "lands, tenements, or hereditaments" to execution, was not liable to that writ. But a tenancy by the curtesy, in my judgment, has no sort of analogy to such an estate as the one mentioned in that case. If, however, this be incor-

rect, it is a sufficient answer to say that our bankrupt statute is much broader, and vests in the assignee all the estate, real and personal, of the bankrupt. Rev. St. § 5044. *Krumbaar v. Burt*, 2 Wash. 406, is also relied on, where it was decided that, under the act of 1800, possibilities did not pass. But our later acts are more enlarged in their operation; and even under the old acts this case was not approved, but overruled. *Belcher v. Burnett*, 126 Mass. 230; *Comegys v. Vasse*, 1 Pet. 193, 218; *Vasse v. Comegys*, 4 Wash. 570; *Nash v. Nash*, 12 Allen, 345. Under the old English acts, which were "very darkly penned" (*Re Marsh*, 1 Atk. 158), when the creditors only took "all such interest in lands as the bankrupt may lawfully depart withall," — *Comegys v. Vasse*, 1 Pet. (original edition) 200, — it was at first determined that only such interests as were alienable at law passed to the assignee, but afterwards it was held that such as were assignable in equity also passed; and possibilities coupled with an interest came to be regarded as assignable. Our bankruptcy act was intended to relieve us of all this trouble by using the most comprehensive terms, and there can be no doubt that every character of property belonging to the bankrupt himself passes. Bare possibilities — such, for instance, as the hope that one has that his father or other relative will die intestate, leaving him an inheritance — do not pass; but I cannot see that the tenancy by the curtesy, either at common law or under this statute, is of that character.

It is also argued, in support of the position that this estate of the husband did not pass, that "the assignee in bankruptcy does not take the whole legal title as heirs and executors do, but only such estate as the bankrupt has a beneficial interest in;" and this is true. If he has not a beneficial interest in a tenancy by the curtesy initiate, it is difficult to see why he has not. He has not so great benefit under the statute as he had at common law, for there are restrictions on his powers of alienation and restrictions on the right of his creditors to subject his interest to their debts; but in neither respect has his interest been wholly demolished, and the assignee only claims by this petition that beneficial interest which the statute left to him. This above-quoted formula is often found in the authorities, but I do not find that it has ever been applied to save to the bankrupt any property that belonged to him, but only such as belonged to third persons and which was held by him under some kind of trust relation. In the earlier stages of bankruptcy legislation, when the statutes were not so elaborate as now, it was a principle resorted to and established by the courts to save to third persons their rights in property which the bankrupt held for them, and to prevent the devolution of such trusts on the assignee, who did not become a general administrator of the bankrupt's legal and equitable powers over all property, doing in his stead for others what the bankrupt was required to do, but was restrained in his title to the property of the bankrupt which creditors could apply to their debts. The assignee, for example, takes subject to a wife's right of

dower, to her right of survivorship; subject to her right to an equitable settlement; subject to all defeasances and contingencies in her favor, or in favor of any third person, for that matter; subject to the liens of a mechanic, or a factor, or the like; subject to the right of rescission of a contract for fraud, in some instances; subject to the estoppels on the bankrupt, where they do not grow out of some fraud on creditors; and, generally, subject to all trusts, liens, and burdens existing at the time. In some cases the circumstances were such the assignee took nothing, and in some only the surplus after the burdens were satisfied. *Brown v. Heathcote*, 1 Atk. 160; *Scott v. Surman*, Willes, 400; *Mitford v. Mitford*, 9 Ves. 87; *Re Dow*, 6 N. B. R. 10; *Rogers v. Winsor*, Id. 246; *Re McKay*, 1 Low. 345; *Re Faxon*, Id. 404; *Re Griffiths*, Id. 431; *Goddard v. Weaver*, 1 Woods, 257; *Re Hester*, 5 N. B. R. 285; *Eberle v. Fisher*, 13 Pa. St. 526; *Eshelman v. Shuman*, Id. 561; *Keller v. Denmead*, 68 Pa. St. 449; *Ontario Bank v. Mumford*, 2 Barb. Ch. 596.

Here, again, our bankruptcy statutes have recognized and declared this principle, and provide that no trust estates shall pass, and that all liens and rights of third persons shall be preserved, so that the assignee either does not take at all, or else takes subject to the liens and burdens. Rev. St. 5053, 5075, 5044, and notes; Bump, Bankruptcy (10th ed.). Applying the principle here, the assignee took the tenancy by the curtesy initiate as it existed at the date of the petition in bankruptcy, subject to the right of the wife, if she survived her husband, to defeat his estate; or, more accurately, subject to the determination that would come by his death, and subject to her rights under this Tennessee statute to remain in possession during her life, jointly with her husband, and that they should, during that time, enjoy the estate without disturbance by his creditors or his assignees of any kind, whether in bankruptcy or any other, unless she, by her deed according to law, should consent to give up the land. And it is possible that, by joint deed of the husband and wife, the assignee's title might have been defeated, even after the bankruptcy, in the same way as is sometimes done where she has a power of appointment; but it is not necessary to decide that here, as no such conveyance was made, and it is well settled that where she has the power to defeat his estate by appointment or conveyance of any kind, her failure to exercise it preserves his rights. The statute operates as a settlement upon her to that extent, but no further. And it is to be observed that it does not, as some statutes do, create a separate estate in the wife, nor destroy his estate in his wife's lands, either that he holds *jure uxoris*, or the larger estate of tenancy by the curtesy.

It is always a question of intention whether the legislature has, by such statutes as these, cut off the husband's marital rights entirely or only partially; and they are construed, just as wills, deeds, marriage settlements, and other conveyances are, to go no further in that direction than the language used, in terms or by necessary implication, re-

quires. This construction I have given the statute is supported by every Tennessee case which has construed or mentioned it. *Johnson v. Sharp*, 4 Cold. 45; *Dodd v. Benthall*, 4 Heisk. 601; *Bottoms v. Corley*, 5 Heisk. 1; *Corley v. Corley*, 8 Bax. 7; *McCallum v. Petigrew*, 10 Heisk. 394; *Lucas v. Rickerich*, 1 Lea, 726; *Young v. Lea*, 3 Sneed, 249; *Coleman v. Satterfield*, 2 Head, 259; *Gillespie v. Worford*, 2 Cold. 632; *Aiken v. Suttle*, 4 Lea, 103.

It is also supported by the cases construing settlements on the wife by will or deed, where the benefits conferred, the language used, and the restrictions on alienation and the husband's marital rights are similar to those in this statute. *Brown v. Brown*, 6 Humph. 126; *Hamrico v. Laird*, 10 Yerg. 222; *Frazier v. Hightower*, 12 Heisk. 94; *Baker v. Heiskell*, 1 Cold. 641; *Appleton v. Rowley*, L. R. 8 Eq. 139; *Marshall v. Beall*, 6 How. 70; *Moore v. Webster*, L. R. 8 Eq. 267; *Bennet v. Davis*, 2 P. Wms. 316; *Eden*, Bankruptcy, 245; 25 Law Lib. 193.

It also finds a complete analogy in the construction of our homestead statutes, which confer a similar benefit on the husband, wife, and children, and yet it is held that creditors may subject the husband's interest, subject to this right of occupancy and possession by the family, which may last during the life of the husband and wife or the survivor, and until the youngest child reaches a certain age. *Moore v. Hervey*, 1 Leg. Rep. (Tenn.) 22; *Mash v. Russell*, 1 Lea, 543; *Lunsford v. Jarrett*, 2 Lea, 579; *Gilbert v. Cowan*, 3 Lea, 203; *Gray v. Baird*, 4 Lea, 212; *Jarman v. Jarman*, Id. 671, 676. In *Mash v. Russell*, *supra*, it is said, "the vendee is clothed with the legal title in reversion expectant on the termination of the homestead estate," which quite as accurately describes the kind of estate the assignee took in this case.

The same ruling has been made in other States where the statutes give a qualified homestead exemption, while in those where the exemption is absolutely of the whole estate, the assignee takes nothing. *Rix v. Capitol Bank*, 2 Dill. 367; *Re Tertelling*, Id. 339; *Re Betts*, 15 N. B. R. 537; *Johnson v. May*, 16 N. B. R. 425; *Re Watson*, 2 N. B. R. 570; *Re Poleman*, 5 Biss. 526; *McFarland v. Goodman*, 6 Biss. 111; *Re Hinkle*, 2 Sawy. 305; *Re Hunt*, 5 N. B. R. 493; *Re Vogler*, 8 N. B. R. 132; *Re Sinnett*, 4 Sawy. 250.

It also finds support in the cases construing statutes of this and other States for the benefit of married women or their families. *Cooper v. Maddox*, 2 Sneed, 135; *Lyon v. Knott*, 26 Miss. 548; *Rabb v. Griffin*, Id. 579; *Stewart v. Ross*, 54 Miss. 776; *Hatfield v. Sneden*, 54 N. Y. 280; *Re Winne*, 1 Lans. 508; s. c. 2 Lans. 21; *Thompson v. Green*, 4 Ohio St. 216, 232; *Plumb v. Sawyer*, 21 Conn. 351; *Silsby v. Bullock*, 10 Allen, 94; *Staples v. Brown*, 13 Allen, 64; *Walsh v. Young*, 110 Mass. 396, 399.

Upon consideration of these authorities it will be found to be a general principle that, whether the settlement is made by statute, deed, will, or contract, the husband's marital rights are not interfered with further than the terms of the settlement go, and that what remains to

him can be subjected by his creditors as if the settlement had not been made; and it is as well settled as it is possible to be that the circumstance that the wife is to receive the rents or profits or to enjoy the estate during her life, or that the husband is forbidden to convey it except with her consent, or that she may alone or jointly with him convey it or defeat the husband's estate by appointment by will or otherwise, will not, nor will any of them combined, alter the construction so as to affect or defeat his marital rights, nor the estate of his assignee or purchaser, except strictly according to the terms of the settlement. If an estate remains to him after her death as the residuum of what he would have had but for the settlement, his creditors may subject it, and it passes by his deed subject to be defeated if she survives or dies without exercising her powers of alienation.

Finally, there is an unreported case in this court, in *Re Stack*, a bankrupt (June, 1879), in which the circuit judge, sitting for the district judge, who was incompetent, upon the same principle decided in favor of the assignee. The wife of the bankrupt, under a deed from him, held land to her "sole and separate use and benefit, free from the debts, liabilities, and control of her present or any future husband, with power to sell, by joint deed with her husband, for reinvestment on same trusts, and if she should die in the life-time of her husband then to revert to him in fee-simple." The estate of her husband was not mentioned in the schedules of the bankrupt, as in this case, he deeming it secure from the operation of the bankrupt law, and the wife died pending the proceedings in bankruptcy, as here, whereupon the assignee filed a petition, like that in this case, and the court compelled the bankrupt to surrender the land to the assignee. Under this deed the wife had all the protection she would have had under this statute, and a larger estate than she would have had if she had inherited the land or held it by an ordinary conveyance. Besides, the land itself was, at the date of the petition in bankruptcy, under the protection of this statute, both as to the interest of the wife and that of the husband. And, as to his interest, the only difference I can see is that there he had a reversionary estate in fee-simple, contingent upon his surviving his wife, but liable to be defeated also by their joint deed (leaving out the reinvestment clause), while here the bankrupt had a life estate, subject to the same contingencies. It was ruled that this estate was vested at the time of the bankruptcy, and did not vest at the death of the wife, and was, therefore, not subsequently acquired property. Furthermore, the ruling must have been the same in that case if Stack had had no contingent reversionary interest under the deed, and it had appeared there was issue of the marriage, for he was, in that event, a tenant by curtesy, notwithstanding this was a separate estate, and would have held the land for his life, unless it may be the words "free from the debts, liabilities, or control of any future husband" should be construed to entirely cut off his (Stack's) curtesy. I do not see any difference in principle between that case and this, because if Stack had

under that deed such an interest as passed to his assignee during the life of his wife, subject to her rights under the deed and this statute, I do not see why the bankrupt here did not have, by the common law regulating the tenancy by the curtesy, such an interest in his life estate as passed, subject to the rights of his wife and his own under the statute.

The objection, in this view of the case, that the children of the wife are not parties to this proceeding, is not tenable. The assignee only claims the life estate of the bankrupt, and in this the children have no interest.

*Motion overruled.*¹

HESSELTINE v. PRINCE ET AL.

DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, JULY 6, 1899.

[Reported in 95 Federal Reporter, 802.]

LOWELL, District Judge. This was a bill in equity filed in the District Court, under the provisions of the bankrupt law, to reach the interest of a husband, after the birth of issue in the real estate of which his wife is seised; the wife being still alive. The defendant raised no objection to the jurisdiction of the court or to the form of proceeding, but demurred to the bill for want of equity. It is necessary, therefore, to determine if the right of the husband, whether it be properly described as tenancy by the curtesy initiate, or otherwise, passes to the trustee in bankruptcy, under the present law. The rights of the husband in the property of his wife are limited by the statutes of Massachusetts, and this court is governed by the interpretation put upon those statutes by the Supreme Court of the Commonwealth. In *Lynde v. McGregor*, 13 Allen, 182, 184, it was said by Mr. Justice Gray that "these statutes are inconsistent with the hypothesis that the husband has any estate in his wife's land which he can convey separately during her lifetime, or which will pass to his assignees in insolvency." The insolvent law of Massachusetts (Gen. St. c. 118, § 44) vested in the assignee in insolvency all the property of the debtor which the latter could have lawfully sold, assigned, or conveyed. This language is as broad as that of section 70 (5) of the bankrupt act, and hence it must be taken that the husband's right in his wife's real estate above described does not pass to the trustee in bankruptcy. See, also, *Walsh v. Young*, 110 Mass. 396, 399. Section (70) 3 was relied upon in argument by counsel for the trustee; but, however the husband's

¹ In *Gibbins v. Eyden*, L. R. 7 Eq. 371, it was held where the wife of a bankrupt had a vested remainder in real estate which did not fall into possession until after the husband's discharge, that, though there had been issue, the assignees were not entitled to the husband's rights. "There can be no inchoate right to curtesy till the wife becomes entitled to an estate of inheritance in possession."

right in his wife's real estate should be described, it certainly is not a power. Demurrer sustained, and bill dismissed, with costs against the estate.

HIGDEN ET AL v. WILLIAMSON.

IN CHANCERY, MICHAELMAS TERM, 1731.

[Reported in 3 Peere Williams, 132.]

A. SEISED in fee of a copyhold estate, surrendered the premises to the use of his will, and afterwards devised them to his daughter for life, then to trustees to be sold, and the money arising by the sale to be divided amongst such of his daughter's children as should be living at the time of her death. The testator died, and the daughter had issue (among others) a son, who was a trader, and becoming a bankrupt, the commissioners assigned over all the bankrupt's estate. The bankrupt got his certificate allowed, and then his mother died.

On a bill brought by the assignees for the bankrupt's share of the money arising by the sale, it was objected, that no manner of right to this contingent interest was vested at the time of the assignment made by the commissioners, any more than a right to lands can be said to vest in an heir apparent during the life of his ancestor; and the case of *Jacobson v. Williams* was cited, where it was held by the Lord Cowper, that the possibility of a right belonging to a bankrupt was not assignable.

But his Honor,¹ upon debate, decreed for the plaintiffs, distinguishing the principal case from that of *Jacobson v. Williams*; for there the husband, the bankrupt, could not have come at his wife's portion by the aid of equity, without making some provision for her; and it was not reasonable the assignees, who stood but in his place, and derived their claim from him, should be more favored. Also the Master of the Rolls said, he laid his finger, and chiefly grounded his opinion, on the words of the statute of 13 Eliz. cap. 7. § 2, which enacts, "that the commissioners shall be empowered to assign over all that the bankrupt might depart withal." Now here the son might, in his mother's lifetime have released this contingent interest; so that the commissioners, by virtue of that act, are enabled to assign it, and consequently their assignees must be well entitled.

Note: in Michaelmas, 1732, this cause came on by way of appeal before the Lord Chancellor King, who affirmed the decree at the Rolls, partly for the reason before given, viz., because the bankrupt himself might have departed with this contingent interest; also, for that the act of 21 Jac. 1. cap. 19, § 1, declares, that the statutes relating to

¹ Sir JOSEPH Jekyll, M. R.

bankrupts shall in all things be largely and beneficially expounded for the relief of creditors; and further, because the statutes for discharging bankrupts on certificates, never intended to entitle the bankrupt to any estate by virtue of any claim anterior (as his Lordship expressed it) to his bankruptcy, as the title in question clearly was; besides, the word "possibility" is in all the latter statutes touching bankrupts.¹

IN RE VIZARD'S TRUSTS.

IN CHANCERY, MAY 29-JULY 14, 1866.

[Reported in 1 Chancery Appeals, 588.]

THIS was an appeal from a decision of Vice-Chancellor Stuart, who had held that the share of F. Vizard in certain property did not pass under a deed of assignment for the benefit of his creditors.

Under the will of George Vizard, the property in question stood limited to his widow for life, and after her death to all and every, or such one or more of the children of his late brothers, John Vizard and Charles Vizard, and the issue of such children as should be dead, in such shares and proportions, and in such manner and form, as the widow should by deed or will appoint; and, in default of appointment, he gave one moiety to the children of John Vizard, as tenants in common, and the other moiety to the children of Charles Vizard, as tenants in common.

In November, 1861, Frederick Vizard, one of the children of Charles, assigned all his property to a trustee for his creditors, by a deed in the form given in Schedule D to the Bankruptcy Act, 1861. This deed was duly registered under the Act. He never obtained any order of discharge.

In 1864 the widow made a will, by which she, in exercise of her power, appointed one moiety of the property to the children of John, equally, and the other moiety to the children of Charles, equally. The children of John and Charles all survived her.

The widow having died, the question now was, whether the share of F. Vizard went to him or to the trustee of the deed. Vice-Chan-

¹ *Re St. John*, 3 N. B. N. 114; *Nash v. Nash*, 12 Allen, 345; *Belcher v. Burnett*, 126 Mass. 230; *Putnam v. Story*, 132 Mass. 205; *Re Robbins' Estate*, 49 At. Rep. 233 (Pa.). See also, *Jones v. Roe*, 3 T. R. 88; *Kinzie v. Winston*, 56 Ill. 56; *Roe v. Humphreys*, 1 Yeates, 427; *Whelen v. Phillips*, 151 Pa. 312. But see *contra*, *Krumhaar v. Burt*, 2 Wash. C. C. 406; *Re Hoadley*, 101 Fed. Rep. 231; *Re Gardner*, 106 Fed. Rep. 670; *Re Wetmore*, 102 Fed. Rep. 290, 108 Fed. Rep. 520 (C. C. A.). See also *Re Twaddell*, 110 Fed. Rep. 145, and the New York decisions cited in *Re Hoadley*.

As to the validity of estates defeasible upon bankruptcy, and the possibility of creating equitable life estates which cannot be made subject to the payment of the beneficiary's debts, see Gray, *Restraints on Alienation* (2d ed.) §§ 149-268.

cellor STUART decided in F. Vizard's favor (Law Rep. 1 Eq. 667), and the trustee appealed.

Mr. *Malins*, Q. C., and Mr. *John Pearson*, for the appellant.

Mr. *Bacon*, Q. C., and Mr. *Chapman Barber*, for the respondent.

Sir G. J. TURNER, L.J., after stating the facts, continued : —

The appellant's claim was not attempted to be rested upon the ground that the mere possibility of interest which Frederick Vizard had at the time of the execution of the deed, in respect of his being one of the objects of the power to whom an appointment might thereafter be made, passed to the appellant by deed. It was not contended that such a mere possibility of interest could be considered to form part of Frederick Vizard's estate and effects, or could be held to pass by the deed, and *Carlton v. Leighton*, 8 Mer. 667, is strong to show that it could not; but it was insisted on the part of the appellant that whatever F. Vizard took, he took under the will of the testator, and that the appointment did not displace or alter the interest which he took under the will in default of appointment, and which had passed to the appellant by the deed, the power being, as it was said, a power of selection only. I think, however, that the power in this case was something more than a power of selection. It was a power to distribute, no less than to select, and it enabled an appointment to be made in favor of persons who would not take in default of appointment, and, certainly, I am not satisfied that the execution of the power of appointment was not of itself sufficient to defeat the limitations in default of appointment contained in the testator's will, but it is not, in my opinion, necessary to decide this point, for I think that the interest of F. Vizard was altered by the exercise of the power. Under the will of the testator, supposing the power not to have been exercised, he took, upon the testator's death, a vested interest in one-fifth of a moiety of the property in question, but under the exercise of the power, his interest, as I apprehend, became contingent on his surviving the widow; for, according to the case of *The Duke of Marlborough v. Lord Godolphin*, 2 Ves. Sen. 61, the dispositions made by the widow, though imported into the will of the testator, would take effect only at her death, and there would be a lapse, therefore, if he died in the widow's lifetime, although he had survived the testator. The mere fact of his having in the result survived the widow, could not, as I apprehend, alter this.¹

¹ A portion of the opinion in which it was held that property acquired after bankruptcy did not pass to the trustee for creditors, is omitted. Sir J. L. KNIGHT BRUCE, L. J., who was also sitting, gave no opinion.

See *Re Wetmore*, 106 Fed. Rep. 670, 108 Fed. Rep. 520.

MOTH v. FROME.

IN CHANCERY, FEBRUARY 26, 1761.

[Reported in 1 Ambler, 394.]

GEORGE BELL, brother of Mary Moth, and Margaret Wade, the plaintiffs, upon his marriage with Anne Frome, conveyed a freehold estate in Middlesex and Berks to himself for life, remainder to Anne for life, remainder to the children as they should appoint; and for want of appointment, to the first and other sons in tail male, remainder to daughters, reversion in fee to himself. The husband and wife died without making any appointment, leaving two children, Anne and Thomas.

22d November, 1758, Margaret Wade became a bankrupt, and in February, 1859, obtained her certificate, and in June, 1760, both the children died, so that the two plaintiffs became co-heirs to Thomas, who survived his sister.

And the question was, Whether Margaret's part of the freehold estate should not go to the assignees as a possibility, according to the words of 5 Geo. II. which are very strong?

MASTER OF THE ROLLS.¹ This is not that kind of possibility: there must be a *persona designata*. Higden v. Williamson, 3 Wms. 132, which was the occasion of the act. It must be a possibility that can be assigned or released, such as she can disclose upon her examination.

Decree for the bankrupt.

IN RE BECKER.

DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA,
DECEMBER 16, 1899.

[Reported in 98 Federal Reporter, 407.]

McPHERSON, District Judge. Whatever may be the accurate description of a license to sell intoxicating liquor in Pennsylvania, — whether it be a personal privilege, merely, or a personal privilege and something more, — this much, at least, is certain: it has a money value, varying in different places, and for different reasons. The statutes of the State permit a license to be transferred, subject to the approval of the court of quarter sessions; and I regard it, therefore, as so far property. "which prior to the filing of the petition [a bankrupt] could by any means have transferred," that the right to sell it (I do not say the right to exercise it) will pass to the trustee. No doubt,

¹ Sir THOMAS CLARKE.

there is clearly visible distinction between a right to property and a mere personal privilege; but I see no abstract reason why some personal privileges may not also come to have qualities belonging usually to property rights alone, — such, for example, as capacity to be transferred, and sufficient attractiveness to make other persons willing to pay money for the opportunity to acquire them. Where, as in the case of a license to sell liquor, these qualities are found to exist in fact, it seems to me that the privilege has ceased to be a privilege merely, and has become, in some sense and in some degree, property also. It can hardly be correct to hold that a bankrupt's creditors may not avail themselves of the fact that money can be had for the chance of stepping into the licensee's place, but that the bankrupt himself may make the same bargain, and put the money safely into his pocket. The license court may or may not accept the buyer as the bankrupt's successor. That is the buyer's affair, and is not decisive upon the point now being considered. He buys a contingency, and buys it with his eyes open; but in my opinion, the trustee has the contingency to sell, and the bankrupt is bound to execute the instruments necessary to carry out the sale.¹

In the case now before the court the sale was made, not by a trustee, but by a receiver; and objection is raised to a receiver's power to sell the property of the bankrupt. The objection is based upon the language of clause 3 of section 2, which authorizes courts of bankruptcy to appoint

¹ *Re Brodbine*, 93 Fed. Rep. 643 *acc.*

The following rights have been held to pass to an assignee or trustee in bankruptcy: —

A license to occupy a stall in a city market passes. *Re Gallagher*, 16 Blatch. 410; *Re Emrich*, 101 Fed. Rep. 230.

A seat in a stock exchange or produce exchange: *Hyde v. Woods*, 94 U. S. 523, *Sparhawk v. Yerkes*, 142 U. S. 12; *Re Ketchum*, 1 Fed. Rep. 840; *Re Warder*, 10 Fed. Rep. 275; *Re Werder*, 15 Fed. Rep. 789; *Re Page*, 107 Fed. Rep. 89 (C. C. A.); *Powell v. Waldron*, 89 N. Y. 328; *Platt v. Jones*, 96 N. Y. 24; which wholly discredited contrary decisions or implications in *Re Sutherland*, 6 Biss. 526; *Barclay v. Smith*, 107 Ill. 349; *Thompson v. Adams*, 93 Pa. 55; *Pancoast v. Gowen*, 93 Pa. 66.

A franchise to build a railroad. *New Orleans, &c. R. R. Co. v. Delamere*, 114 U. S. 501.

A right in an office, if of a kind which the law permits to be assigned. *Ex parte Butler*, 1 Atk. 210.

The goodwill of a business. *Cruttwell v. Lye*, 17 Ves. 336; *Ex parte Thomas*, 2 Mont. D. & De G. 294; *Hudson v. Osborne*, 21 L. T. n. s. 386; *Walker v. Mottram*, 19 Ch. D. 355. But not so far as to prevent a bankrupt from subsequently doing business in his own name and soliciting trade from his former customers. See cases above cited and *Ginesi v. Cooper*, 14 Ch. D. 596, 600; *Hembold v. Hembold Co.*, 53 How. Pr. 453.

A Patent-right: *Barton v. White*, 144 Mass. 281; copyright: *Mawman v. Tegg*, 2 Russ. 385, 392; trade-name or trade-mark: *Longman v. Tripp*, 2 B. & P. N. R. 67; *Ex parte Foss*, 2 De. G. & J. 230; *Pepper v. Labrot*, 8 Fed. Rep. 29; *Warren v. Warren*, 134 Mass. 247 (see also *Bury v. Bedford*, 4 De G. J. & S. 352, 371), even though not so expressly stated in the act. And even though expressly so stated in the present act (sec. 70 a (2)), the qualification must be implied that a trade-name or mark which necessarily indicates the personal production of the bankrupt cannot pass to his trustee. See Am. & Eng. Encyc. of Law, Vol. 26, p. 371. Rights under an application for a patent do not pass. *Re McDonnell*, 101 Fed. Rep. 239.

receivers, "for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee qualified." It is argued that this limits the power of receivers, and forbids them to do more than hold possession of the bankrupt's property during a certain interval. I do not think the argument is sound. The clause restricts the power of the court to appoint, confining it to cases of absolute necessity, and then goes on to state the purpose for which the appointment may be originally made. But, after a receiver has once gone into possession, it may become necessary to sell the property for the very purpose of preserving it, or its value, — which is, of course, the essential matter, — either in whole or in part. In such event, I think the court has ample power to order or confirm a sale, either under the power to preserve, implied by clause 3 itself, or under clause 7 of the same section, which empowers the court to "cause the assets of bankrupts to be collected, reduced to money, and distributed."

The exceptions are dismissed, and the referee's opinion and order are approved.

WILLIAMS v. HEARD.

UNITED STATES SUPREME COURT, MAY 1-25, 1891.

[Reported in 140 United States, 529.]

MR. JUSTICE LAMAR, after stating the case, delivered the opinion of the court.

The single question on the merits of the case is, whether, at the date of their adjudication in bankruptcy, the claim of the defendants in error for war premiums passed to their assignees in bankruptcy as a part of their estate.

As preliminary to the discussion of the merits of the case, it is urged by the defendants in error that this is not a federal question, and that, therefore, the writ of error should be dismissed. We do not think, however, that this contention can be sustained. Both parties claim the proceeds of the award, — the defendants in error asserting that it did not pass to their assignees in bankruptcy under section 5044 of the Revised Statutes, and the plaintiff in error insisting that the claim was a part of their estate at the date of their adjudication in bankruptcy, and did pass to the assignees under that section of the Revised Statutes. The assignee's claim to the award is based on that section of the statutes; and as the State court decided against him, this court has jurisdiction, under section 709 Revised Statutes, to review that judgment; for the decision of the State court was against a "right" or "title" claimed under a statute of the United States, within the meaning of that section.

The case upon the merits is more difficult. There is high authority in the State courts in support of the judgment of the court below. The same general question has arisen in New York, in Maryland, and in Maine; and in each instance the decision has been, like the one we are reviewing, against the assignee. See *Taft v. Marsily*, 120 N. Y. 474; *Brooks v. Ahrens*, 68 Md. 212; and *Kingsbury v. Mattocks*, 81 Me. 310. But as the question is one arising under the bankruptcy statute of the United States, we cannot rest our judgment upon those adjudications alone, however persuasive they may be.

By the treaty of Washington, concluded May 8, 1871, between the United States and Great Britain, and proclaimed July 4, 1871, 17 Stat. 863, it was provided that, in order to settle the differences which had arisen between the United States and Great Britain respecting claims growing out of depredations committed by the Alabama and other designated vessels which had sailed from British ports, upon the commerce and navy of the United States, which were generically known as the Alabama Claims, those claims should be submitted to a tribunal of arbitration called to meet at Geneva, in Switzerland. The claims presented to that tribunal on the part of the representative of the United States included those arising out of damages committed by those cruisers, and also indirect claims of several descriptions, and among them claims for enhanced premiums of insurance, or war risks, as they were sometimes called. As respects the claims for enhanced premiums for war risks, and certain other indirect claims, objection was made by Great Britain to their consideration by the tribunal, as not having been included in the purview of the treaty; and as no agreement could be reached upon this point between the representatives of the respective governments, the arbitrators, without expressing any opinion upon the point of difference as to the interpretation of the treaty, stated that, "after the most careful perusal of all that has been urged on the part of the government of the United States in respect of these claims, they have arrived, individually and collectively, at the conclusion that these claims do not constitute, upon the principles of international law applicable to such cases, good foundation for an award of compensation or computation of damages between nations, and should, upon such principles, be wholly excluded from the consideration of the tribunal in making its award, even if there were no disagreement between the two governments as to the competency of the tribunal to decide thereon." Messages and Documents, Department of State, pt. 2, vol. iv. 1872-73, p. 20.

This declaration of the tribunal was accepted by the President of the United States as determinative of their judgment upon the question of public law involved; and, accordingly, those indirect claims were not insisted upon before the tribunal, and were not, in fact, taken into consideration in making their award. *Id.*, p. 21.

The tribunal finally awarded to the United States \$15,500,000 as indemnity for losses sustained by citizens of this country by reason of

the acts of the aforesaid cruisers, and that sum was paid over by Great Britain.

It was held in United States v. Weld, 127 U. S. 51, that this award was made to the United States as a nation. The fund was, at all events, a national fund, to be distributed by Congress as it saw fit. True, as citizens of the United States had suffered in person and property by reason of the acts of the Confederate cruisers, and as justice demanded that such losses should be made good by the government of Great Britain, the most natural disposition of the fund that could be made by Congress was in the payment of such losses. But no individual claimant had, as a matter of strict legal or equitable right, any lien upon the fund awarded, nor was Congress under any legal or equitable obligation to pay any claim out of the proceeds of that fund.

We premise this much to show that, as respects the various claims, both of the first and second classes, for which payment was afterwards provided by Congress, they stood on a basis of equality, in the matter of legal right on the part of the claimants to demand their payment, or legal obligation on the part of the government of the United States to pay them. There was undoubtedly a moral obligation on the United States to bestow the fund received upon the individuals who had suffered losses at the hands of the Confederate cruisers: and in this sense all the claims, of whatsoever nature, were possessed of greater or less pecuniary value. There was at least a possibility of their payment by Congress,—an expectancy of interest in the fund; that is, a possibility coupled with an interest.

177→ The first provision made for the distribution of this fund was by the Act of June 23, 1874, 18 Stat. 245, c. 459. By that act there was established a court known as the Court of Commissioners of Alabama Claims, to be composed of five judges, whose duties, among other things, were to receive and examine all claims admissible under the act that might be presented to them, directly resulting from damage caused by the afore-mentioned Confederate cruisers. By section 8 the court was to exist for one year from the date of its first convening and organizing, and the President might, by proclamation, extend its existence for six months more. By subsequent acts of Congress the existence of the court was continued until January 1, 1877, to enable it to complete the business for which it was created.

The claims allowed by this court did not amount to the sum of the award; and as many claims had not been presented to the court. Congress, by the Act of June 5, 1882, 22 Stat. 98, c. 195, re-established the court "for the distribution of the unappropriated moneys of the Geneva award." It was made the duty of the court, as reorganized, to receive and examine the claims which might be presented, putting them into two classes, and to render judgment for the amounts allowed. Claims of the first class were those "directly resulting from damage done on the high seas by Confederate cruisers during the late rebellion, including vessels and cargoes attacked on the high seas, although the loss or

damage occurred within four miles of the shore;" and claims of the second class were those "for the payment of premiums for war risks, whether paid to corporations, agents, or individuals, after the sailing of any Confederate cruiser."

As already stated, the defendants in error were adjudicated bankrupts August 5, 1875, and were discharged July 20, 1877. No steps were taken in the matter of their claim until after the passage of the act of 1882. The award was made by the Court of Commissioners in December, 1886, that court finding that the assignees of the defendants in error were entitled to such award.

It is urged on behalf of the plaintiff in error that this finding, that the assignees were entitled to the amount of the award on this claim, was final, and not subject to review in any other court or tribunal. In other words, it is insisted that the decision of that court, both as respects the amount to be paid on the claims, and also as to who was entitled to receive that amount, was final and irrevocable.

We are not impressed with this view. In our opinion it is unsound. The object for which the Court of Commissioners of Alabama Claims was established was to pass upon the claims which were presented to it for adjudication, and determine the amount to be paid by the United States on each claim. Questions respecting the ownership of the respective claims did not concern the court. Its function was performed when it rendered its judgment on the merit of the claims. Its judgments were final upon all parties, as respects the validity of the claim, and the amount to be paid in satisfaction of it; but there is nothing in the acts of Congress relating to this matter, or in the reason of things, to indicate that the judgment of the court, as to who were the owners of the respective claims submitted, should be considered final and irrevocable.

Passing now to the most important question in the case, we are to consider whether the claim passed to the assignees of the defendants in error by virtue of the deed of assignment in their bankruptcy proceedings; or whether, on the other hand, it never constituted a part of the estate until the passage of the act of 1882. From the agreed statement of facts it is ascertained that the assignments in bankruptcy were in the usual form.

By section 5044, Rev. Stat., it is provided that "all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto," shall be conveyed to the assignee immediately after he is appointed and qualified. Section 5046 puts the assignee in the same position as regards all manner and description of the bankrupt's property (except that specifically exempt), as the bankrupt himself would have occupied had no assignment been made. And subsequent sections establish in the assignee the right to sue for and recover all the bankrupt's "estate, debts, and effects" in his own name, and otherwise represent the bankrupt in every particular as respects the latter's property, of whatever species or description.

It must be conceded that the language of the Revised Statutes relating to bankruptcy to which we have referred is broad and comprehensive enough to embrace the whole property of the bankrupt. Was the claim in this case property in any sense of the term? We think it was. Who can doubt but that the right to prosecute this claim before the Court of Commissioners of Alabama Claims would have survived to their legal representatives had the original claimants been dead at the passage of the act of 1882? If so, the money recovered would have been distributable as assets of the estate. While, as already stated, there were no means of compelling Congress to distribute the fund received in virtue of the Geneva award, and while the claimant was remediless with respect to any proceedings by which he might be able to retrench his losses, nevertheless there was at all times a moral obligation on the part of the government to do justice to those who had suffered in property. As we have shown from the history of the proceedings leading up to the organization of the tribunal at Geneva, these war premiums of insurance were recognized by the government of the United States as valid claims for which satisfaction should be guaranteed. There was thus at all times a possibility that the government would see that they were paid. There was a possibility of their being at some time valuable. They were rights growing out of property, — rights, it is true, that were not enforceable until after the passage of the act of Congress for the distribution of the fund. But the act of Congress did not create the rights. They had existed at all times since the losses occurred. They were created by reason of losses having been suffered. All that the act of Congress did was to provide a remedy for the enforcement of the right.

The claims in this case differ very materially from a claim for a disability pension¹ to which they are sought to be likened. They are descendible; are a part of the estate of the original claimants which, in case of their death, would pass to their personal representatives and be distributable as assets; or might have been devised by will; while a claim for a pension is personal, and not susceptible of passing by will, or by operation of law, as personalty.

Neither do we think that the money appropriated by Congress by the act of 1882 to pay these claims should be considered merely as a gra-

¹ A pension solely for past services will pass to an assignee or trustee in bankruptcy, but not a pension in consideration of continuing of future services. Spooner v. Payne, 1 De G. M. & G. 383; Wells v. Foster, 8 M. & W. 149; Ex parte Huggins, 21 Ch. D. 85. See also Oliver v. Emsonne, Dyer, 1 b; York v. Twine, Cro. Jac. 78; Heald v. Hay, 3 Giff. 467; Carew v. Cooper, 4 Giff. 619; Ellis v. Earl Grey, 6 Sim. 214; Tunstall v. Boothby, 10 Sim. 542; Knight v. Bulkeley, 5 Jur. n. s. 817; Ex parte Webber, 18 Q. B. D. 111; McCarthy v. Goold, 1 Ball & Beatty (Ir. Ch.), 387. The matter of government pensions is now largely regulated by statute. The English Act of 1883, § 53 (2), gives the court power to direct that the court may "make such order as it thinks just for the payment of . . . half-pay or pension, or of any part thereof, to the trustee." In the United States the pensions of soldiers and sailors cannot be assigned. Rev. Stat., § 4745.

tuity.¹ On this point we can do no better than to quote the language of the learned judge of the court below who delivered the dissenting opinion. He says: "If Congress intended by these statutes to appropriate the money to certain persons as a gratuity, the only matters for the Court of Commissioners to deal with would have been the persons intended by the statutes, and the amounts given to each; and it is difficult to see how a judicial court could re-examine the distribution made by the Court of Commissioners unless the persons to whom that court awarded the money claimed and received it in some representative capacity." The judicial courts determine the ownership of the money awarded only on the ground that it follows the ownership of the property as compensation for which the awards were made. Congress did not, however, in these statutes specify the persons entitled to receive the money otherwise than by describing the claims to be admitted, except that it provided for the exclusion of claims for the loss of property insured to the extent of the indemnity received from the insurance, and that no claim shall be allowed 'in favor of any person not entitled at the time of the loss to the protection of the United States in the premises,' nor 'in favor of any person who did not at all times during the late rebellion bear true allegiance to the United States.'" 146 Mass. 554, 555.

We have authority in this court for the position we maintain. In *Comegys v. Vasse*, 1 Pet. 193, the controversy was between a bankrupt and his assignees over a claim against the government of Spain for insurance on various vessels and cargoes which had been condemned by the Spanish prize courts. The case was this: Vasse had been an underwriter on ships and cargoes owned by citizens of the United States which were captured and carried into the ports of Spain, and abandonments having been made thereof to him, he paid the losses thus arising prior to the year 1802. In that same year he became embarrassed and made an assignment under the bankrupt law of April 4, 1800. His certificate of discharge was dated May 28, 1802. In his return of his property and effects to the commissioners, which he was required to make by the act, he did not include this claim against Spain, because it was not believed to have any value, depending, as it did, merely on the discretion and pleasure of the Spanish government. By the treaty of 1819 with Spain, that government stipulated to pay five millions of dollars in full discharge of the unlawful seizures which

¹ In the following cases the debtor having no previous legal right to the property in question, it was held his assignee or trustee in bankruptcy took nothing. *Wills v. Wells*, 8 Taunt. 264 (money voluntarily paid by an insurance company on a void policy); *Ex parte Piercy*, L. R. 9 Ch. 33 (money received in accordance with a contract between third persons); *Ex parte Wicks*, 17 Ch. D. 70 (a voluntary allowance); *Ex parte Webber*, 18 Q. B. D. 111 (a "compassionate allowance" paid to a disabled government employee); *Tallman v. Tallman*, 5 Cush. 325 (money awarded to an heir not legally entitled to anything by arbitrators, with power to act according to "substantial justice and right"); *Gillan v. Gillan*, 55 Pa. 430 (money awarded by a State to victims of a disaster). See also *Emerson v. Hall*, 13 Pet. 409.

she had made, and the money was afterwards paid over. Under the distribution of that fund the assignees in 1824 received a sum amounting to over \$8,000, as a part of the bankrupt's estate. Vasse brought suit to recover it from the assignees, and recovered judgment in the Circuit Court; but on error this court reversed that judgment, and held that the claim for which satisfaction had been made was a part of the estate of the bankrupt in 1802, and therefore passed to the assignees under the deed of assignment. The bankrupt act of 1800, under which the case arose, was quite similar to the statute involved in this case, providing that "all the estate, real and personal, of every nature and description, to which the bankrupt might be entitled, either in law or in equity," should go to his assignee; and the court held that those words were broad and comprehensive enough to cover every description of vested right and interest attached to and growing out of property. The opinion of the court was delivered by Mr. Justice Story. In the course of his remarks he said: "It is not universally, though it may ordinarily be one test of right, that it may be enforced in a court of justice. Claims and debts due from a sovereign are not ordinarily capable of being so enforced. Neither the king of Great Britain nor the government of the United States is suable in the ordinary courts of justice for debts due by either; yet who will doubt that such debts are rights? It does not follow because an unjust sentence is irreversible that the party has lost all right to justice, or all claim, upon principles of public law, to remuneration. With reference to mere municipal law, he may be without remedy; but with reference to principles of international law, he has a right both to the justice of his own and the foreign sovereign." 1 Pet. 216.

Again, referring to the language of the bankrupt act of 1800, he said: "'All the estate, real and personal, of every nature and description, in law or equity,' are broad enough to cover every description of vested right and interest attached to and growing out of property. Under such words the whole property of a testator would pass to his devisee. Whatever the administrator would take, in case of intestacy, would seem capable of passing by such words. It will not admit of question that the rights devolved upon Vasse by the abandonment could, in case of his death, have passed to his personal representative, and when the money was received be distributable as assets. Why, then, should it not be assets in the hands of the assignees? Considering it in the light in which Lord Hardwicke viewed it, as an equitable trust in the money, it is still an interest, or, at all events, a possibility coupled with an interest." 1 Pet. 218, 219.

The principles of that case were applied in *Milnor v. Metz*, 16 Pet. 221, to the case of a claim for extra pay for services rendered by a bankrupt as gauger at the port of Philadelphia, which, although presented to Congress prior to his adjudication in bankruptcy, was not recognized by that body or satisfied until afterwards, the court holding that the claim passed to the assignee as part of the bankrupt's estate, and that the doctrine of donation did not apply.

In *Phelps v. McDonald*, 99 U. S. 298, McDonald, who was a British subject residing in the United States, was declared a bankrupt in 1868, and the conveyance of his estate was made in the usual form by the register to an assignee. At that time he had a claim against the United States, of which the commission organized under the treaty of Washington took cognizance, and made an award for its payment. It was held that such claim passed to the assignee. In the opinion of the court, delivered by Mr. Justice Swayne, after referring to *Comegys v. Vasse*, and other cases of that nature, it was said: "There is no element of a donation in the payment ultimately made in such cases. Nations, no more than individuals, make gifts of money to foreign strangers. Nor is it material that the claim cannot be enforced by a suit under municipal law which authorizes such a proceeding. In most instances the payment of the simplest debt of the sovereign depends wholly upon his will and pleasure. The theory of the rule is that the government is always ready and willing to pay promptly whatever is due to the creditor. . . . It is enough that the right exists when the transfer is made, no matter how remote or uncertain the time of payment. The latter does not affect the former. . . . If the thing be assigned, the right to collect the proceeds adheres to it, and travels with it whithersoever the property may go. They are inseparable. Vested rights *ad rem* and *in re*—possibilities coupled with an interest and claims growing out of property—pass to the assignee." 99 U. S. 303, 304. To the same effect are *Erwin v. United States*, 97 U. S. 392; *Bachman v. Lawson*, 109 U. S. 659.

There is nothing in *United States v. Weld*, 127 U. S. 51, that militates against the view herein presented. In that case it was held that, as respects the jurisdiction of the Court of Claims to entertain the suit against the United States under section 1066, Rev. Stat., the claim must be regarded as growing out of the act of 1882, because that act furnished the remedy by which the rights of the claimant might be enforced. But that is an entirely different proposition from the one contended for here by the defendants in error, that the claim was created by that act.

In our opinion this case falls within the principles of *Comegys v. Vasse* and *Phelps v. McDonald*, and the judgment of the court below is

*Reversed, and the cause remanded for further proceedings not inconsistent with this opinion.*¹

¹ *Butler v. Gorely*, 146 U. S. 303, *acc.* See also *Price v. Forrest*, 173 U. S. 410, where money repaid under act of Congress in reimbursement of money advanced by a government officer was held to pass to a receiver (*conf.* *Emerson v. Hall*, 13 Pet. 409); and *Calder v. Henderson*, 54 Fed. Rep. 802 (C. C. A.), where a planter's right to a government bounty for raising sugar was held to pass under the insolvency law of Louisiana.

But where, as in its legislation in regard to French spoliation, Congress indicates an intention to pay an indemnity to the next of kin of the original sufferer, an assignee in bankruptcy, either of the original sufferer or of any intermediate descendant.

WRIGHT ET AL., ASSIGNEES, v. FIRST NATIONAL BANK OF GREENSBURG.

CIRCUIT COURT FOR THE DISTRICT OF INDIANA, JULY, 1878.

[Reported in 8 Bissell, 243.]

GRESHAM, J. The declaration alleges that the defendant has reserved, taken, and received usurious interest from the bankrupts. The action is brought to recover double the amount of interest thus paid, and is based upon the 30th section of the National Banking Act, which reads as follows:—

"Every association organized under this act may take, receive, reserve, and charge on any loan . . . interest, at the rate allowed by the laws of the State or territory where the bank is located, and no more; except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized in any such State, under this act. And when no rate is fixed by the laws of the State or territory, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of interest thus paid, from the association taking or receiving the same."

The defendant demurs to the declaration, on the ground that the plaintiffs, as assignees in bankruptcy, have no legal capacity to prosecute the action. This is the only question presented by the demurrer.

The right of action given by this section is penal. *Tiffany v. National Bank*, 18 Wall. 409.

In the absence of a statute authorizing it, a right to a penalty cannot be assigned, nor, a right of action for a tort. *Gardiner v. Adams*, 12 Wend. 297. The defendant exacted and received usurious interest. Had the bankrupts remained solvent, they might have prosecuted an action for double the amount of interest paid. Unless the right of action has been barred, it yet exists, either in the bankrupts or their assignees. It is insisted that because the bankrupts could not have sold or transferred the right of action, if they had remained solvent, that, therefore, their assignees have no legal capacity to prosecute the suit. *Tiffany v. The National Bank*, *supra*, was an action by a trustee, to recover the penalty given by the statute. The plaintiff recovered, but his capacity to maintain the action seems not to have been directly raised. In the case of *Crocker, Assignee, v. First National Bank*, 4 Dill. 358, the precise question raised by this demurrer was considered, and it was ant. gets nothing. *Blagge v. Balch*, 162 U. S. 439. See also *Briggs v. Walker*, 171 U. S. 466.

held by Dillon, Judge, that the assignee was the "legal representative" of the borrower within the meaning of the banking act, and as such could maintain the suit whether the right of action vested in the assignee under the bankrupt law or not.

In *Tiffany v. Boatman's Institution*, 18 Wall. 375, the assignee in bankruptcy was allowed to recover usurious interest, which had been paid by the bankrupt in violation of the statutes of Missouri.

In *Meech v. Stoner*, 19 N. Y. 26, it was held that an assignee could maintain an action to recover money lost at faro, under a statute which gave the right of action to the loser.¹ See also *Carter v. Abbott*, 1 Barne. and Cress. 444, and *Gray v. Bennett*, 3 Met. 522. In this last case, the assignee of the insolvent debtor was allowed to recover three-fold the amount of usurious interest paid to the defendant, that being the amount allowed by the Massachusetts statutes. This is a well-considered case.

In *Bromley, Assignee, v. Smith*, 2 Biss. 511, it was held by Miller, District Judge, that the assignee could not maintain an action to recover the penalty given by the statute. And it seems to be conceded that in the case of *Barnett v. Muncie National Bank*, in the Circuit Court of the United States for the Southern District of Ohio, a similar ruling was made by Justice Swayne, and the late Circuit Judge, Emmons, in an oral, but unreported opinion. To the same effect is *Nichols v. Belows*, 22 Vt. 581.²

The bankrupt act vests in the assignee for the creditors the entire estate of the debtor — everything of beneficial interest passes by the deed of assignment, except certain necessary exemptions which are intended to protect the bankrupt and his family from temporary distress.

It is true that rights of action for torts to the debtor's person, such as assault and battery, false imprisonment, malicious prosecution, libel, and slander, do not pass to the assignee. While it must be conceded that under the decision of the Supreme Court, this is an action, in part at least, to recover a penalty, yet there are reasons why claims of this kind should vest in the assignee which do not apply to rights of action for damages growing out of mere torts to the debtor's person. In the right of action given by the banking act the bank exacts and receives from the borrower more than the law allows as a fair compensation for the use of its money. In this illegal way, the bank gets into its possession part of the borrower's estate, money which should go to the creditors of the bankrupt borrower. This demand and receipt of illegal interest by the bank may have materially contributed to the bankrupt's downfall. The recovery allowed by the 30th section of the act is "in any action of debt."

If the assignees are not the "legal representatives" of the bankrupt

¹ *Brandon v. Pate*, 2 H. Bl. 308; *Brandon v. Sands*, 2 Ves. 514, *acc.*

² *Lafountain v. Burlington Savings Bank*, 56 Vt. 332, *acc.* See also *Osborn v. First Nat. Bank*, 175 Pa. 494.

within the meaning of the 30th section of the banking act, and the right of action never passed to them under the bankrupt act, then, unless the suit has been barred, the bankrupts may sue for and recover the money for their own benefit, when, perhaps, they have already received their full exemptions and have been discharged from all their obligations.

As between the bankrupts and their creditors, this would be unjust, and such a result is not easily reconciled with the chief object of the bankrupt law, which is the equal distribution of the insolvent debtor's entire estate amongst all his creditors.

In *Gray v. Bennett*, *supra*, "it is very clear," say the court, "that if a creditor of the insolvent debtor should attempt to prove a note under the commission, it would be the duty of the assignee to reduce the amount, if usurious interest had been taken on it, or was reserved in it, and in this manner the creditors would be benefited by such reduction. Why should they not have the advantage of it where the debtor was paid the usurious demand, prior to the insolvency and within the time limited by the statute for recovering it?"

I think the assignees are the "legal representatives" of the bankrupts within the meaning of the 30th section of the banking act; and that the right of action given by that section is a "claim" or "debt" which passed to the assignees under the provisions of the bankrupt law.

*Demurrer overruled.*¹

ROSE v. BUCKETT.

COURT OF APPEAL, MAY 15, 16, 23, 1901.

[Reported in [1901] 2 King's Bench Division, 449.]

APPEAL from a decision of GRANTHAM, J.

The action was brought by the grantor of a bill of sale for trespass and for seizure and conversion of the plaintiff's goods. By his statement of claim (paragraphs 2, 3, and 4) the plaintiff alleged that on three different occasions the defendant, Margaret Buckett, by her agents and servants, the other defendants, had wrongfully entered the plaintiff's house, and had remained there for a day or longer, and had wrongfully seized the plaintiff's furniture, goods, and effects which were upon the premises, and had refused either to leave the premises or to

¹ In addition to cases cited, see *Thomas v. Watson*, Taney, 297; *Louisville Trust Co. v. Kentucky Nat. Bank*, 87 Fed. Rep. 143; *Henderson Nat. Bank v. Alves*, 91 Ky. 146; *Tamplin v. Wentworth*, 99 Mass. 63; *Pearson v. Gooch*, 69 N. H. 571; *Wheelock v. Lee*, 64 N. Y. 242; *Monongahela Nat. Bank v. Overholt*, 96 Pa. 327 (*conf.* *Osborn v. First Nat. Bank*, 175 Pa. 494); *Moore v. Jones*, 23 Vt. 739, *acc.* See also *Re Hoole*, 3 Fed. Rep. 501.

In *Killen v. Barnes*, 106 Wis. 546, it was held that the liabilities of bank officials for official misconduct passed to an assignee for the benefit of creditors.

give up the said goods and effects when requested to do so, but had converted the same in part to their own use.

Paragraph 5 of the statement of claim was as follows:—

“By reason of the foregoing the plaintiff has suffered damage, personal inconvenience, and annoyance to himself and family, by being wrongfully deprived of his property and of the quiet enjoyment of his house and premises from time to time by the defendants as aforesaid.”

The plaintiff claimed damages from the defendants “for the aforesaid wrongful entry to his said premises, and for wrongful seizure and conversion of his said furniture, goods, and effects as aforesaid. The defendants justified their conduct under the provisions of section 7 of the Bills of Sale Act Amendment Act, 1882, and they denied the conversion. The plaintiff in reply alleged that the bill of sale did not comply with the requisitions of the Act.

After the cause was set down for trial the plaintiff became bankrupt, and before the jury were sworn the defendants applied to GRANTHAM, J., for an order to stay proceedings in the action upon the ground that all the causes of action had become vested in the trustee in bankruptcy, the official receiver. Upon this application the plaintiff admitted that no substantial damage had been done to the premises or to the goods, and put forward the personal annoyance to himself and family as his main ground of complaint. The learned judge thought that this was not a case in which the plaintiff could claim vindictive damages, and consequently that the right of action passed to the trustee in bankruptcy. He therefore granted a stay of proceedings.

The plaintiff appealed.

W. R. Warren, for the plaintiff. The question is whether the right of action in this case passes to the trustee in bankruptcy or remains in the bankrupt. There can be only three kinds of cause of action here,—damage to the goods, damage to the premises, and damage to the individual. It is admitted that there was no damage done to the goods or the premises, and the only cause of action which remains is damage to the individual. In an action of trespass the plaintiff has a cause of action for annoyance to himself and family occasioned by the invasion of his property. That cause of action remains in the bankrupt even though there are other claims for damage to property: *Clark v. Calvert*, 8 Taunt. 742, 3 Moo. 96, 21 R. R. 528; *Beckham v. Drake*, 2 H. L. C. 579, 629, 634; *Spence v. Rogers*, 11 M. & W. 191, affirmed *sub nom. Rogers v. Spence*, first by the Court of Exchequer Chamber, 13 M. & W. 571, and ultimately by the House of Lords, 12 Cl. & F. 700. Lord Campbell there suggests that in a mixed case of injury to the person and injury to the property the law would give an action to the bankrupt for the personal injury, and an action to the assignee for the injury to the property, thereby showing that the damage to the person and the damage to the property may be separated.

[COLLINS, L. J. Suppose an action brought for trespass and judgment given for 40s., could you then bring a separate action for the personal annoyance sustained in respect of the same trespass?]

Yes. In a running-down case resulting in damage to the plaintiff's cab and damage to his person, it was held that there were two separate causes of action, although arising out of the same tort or neglect of the defendant. *Brunsdon v. Humphrey*, 14 Q. B. D. 141. So here the personal annoyance occasioned by the trespass is a separate cause of action.

[COLLINS, L. J. That is subject to the question whether it was not an aggravation of the cause of action in respect of the property.]

Hodgson v. Sidney, L. R. 1 Ex. 313, 35 L. J. (Ex.) 182, may be cited against the plaintiff, but it is distinguishable from the present case. That was an action for a false representation which resulted in a direct pecuniary loss to the plaintiff of £2,000, and the personal annoyance was merely subsidiary. Here the personal annoyance is the principal ground of complaint.

In *Brewer v. Dew*, 11 M. & W. 625, an action of trespass, in which the primary cause of action was the personal annoyance to the plaintiff, was held not to pass to the assignees in bankruptcy. That was an action for seizure of goods, and Lord Abinger there intimated that the test was whether the jury could give vindictive damages beyond the value of the goods; and he also suggested that the defendants might have limited their plea so as to make it good by stating that, so far as regards the value of the goods, the plaintiff had lost his right of action by his bankruptcy. Again, in *Howard v. Crowther*, 8 M. & W. 601, which was an action for seduction of a servant, the same learned judge said that assignees in bankruptcy were "not entitled to make a profit of a man's wounded feelings," and he held that the right to sue remained in the bankrupt. That principle applies here.

Blake Odgers, K. C., and *Spokes*, for the defendants. The cause of action, as appears from the statement of claim itself, is damage to the premises and goods, and the allegation of personal annoyance flows from that. Can it be said that any one of the plaintiff's family could bring an action for personal inconvenience arising from the trespass? Where the cause of action is injury to property, that passes to the trustee in bankruptcy, even though it be alleged that the bankrupt has suffered personal inconvenience, provided that the inconvenience arises out of the cause of action. As the law now stands, the cause of action cannot be split. It is one and indivisible, and it passes to the trustee; it is a "thing in action" within section 168 of the Bankruptcy Act, 1888. The personal inconvenience to the plaintiff and his family is alleged as a piece of damage arising out of the cause of action previously alleged. The cases cited on behalf of the plaintiff were decided under a totally different bankruptcy law. Under the bankruptcy law in force at the time when *Clark v. Calvert*, and *Rogers v. Spence* were decided, a lease did not pass to the bankrupt's assignees unless they elected to take it, and that is the true ground of those decisions; but now the lease passes to the trustee unless he disclaims. The expression "things in action" appears first in the Bankruptcy Act of 1869,

and it is repeated in the Act of 1883. Formerly it was only a cause of action by which the estate of the bankrupt was diminished that passed to his assignees. Now the presumption is that everything which the bankrupt has passes to his trustee, the only exception being where the action is of an entirely personal character, e. g., an action for assault. It may be that in such a case the right of action would remain in the bankrupt; though, strictly speaking, "things in action" would include that also. Trespass to lands and trespass to goods go to the trustee in bankruptcy, and the mere fact that personal annoyance has resulted therefrom makes no difference. Brewer v. Dew is distinguishable because it was there alleged that the trespass was committed under a false allegation of right, whereas in this case no wilful wrong is imputed to the defendants. Further, it is inconsistent with *Hodgson v. Sidney*, which shows that where, as here, the cause of action is infringement of a right of property, it passes to the assignee, and with it must go any ancillary claim for personal inconvenience to the bankrupt and his family. *Hodgson v. Sidney* has since been followed by the majority of the court in *Morgan v. Steble*, L. R. 7 Q. B. 611. In *Brunsdon v. Humphrey*, two distinct rights were infringed. Since the Bankruptcy Act of 1869 the courts have put a wider interpretation upon what passes to the trustee in bankruptcy. *Wadling v. Oliphant*, 1 Q. B. D. 145; *Emden v. Carte*, 17 Ch. D. 169, 768; *Metropolitan Bank v. Pooley*, 10 App. Cas. 210.

[*STIRLING, L. J.* *Ex parte Vinc*, 8 Ch. D. 364, shows that the Bankruptcy Act, 1869, did not affect the rule that a cause of action for injury to personal reputation does not pass to the trustee.

[*COLLINS, L. J.* The law is so stated in *Baldwin on Bankruptcy*, 8th ed., p. 292, and *Williams on Bankruptcy*, 7th ed., p. 200.]

Warren, in reply. The right of action in respect of the invasion of the plaintiff's quiet enjoyment of the property remains in the bankrupt. It is a merely personal right; it would not pass to his legal personal representatives, and it is not assignable. *Hill v. Boyle*, L. R. 4 Eq. 260; *Prosser v. Edmonds*, 1 H. & C. Ex. 481; *Wood v. Downes*, 18 Ves. 120, 11 R. R. 160. For the purpose of maintaining an action of trespass it is immaterial whether there be any actual damage or not. "Every invasion of private property, be it ever so minute, is a trespass." *Entick v. Carrington*, 19 State Trials, 1030, 1066. In *Ashby v. White*, 2 Ld. Raym. 938, it was held that a man who has a right to vote at an election of members of Parliament can maintain an action against the returning officer for refusing to admit his vote, even though the persons for whom he offered to vote were elected.

Cur. adv. vult.

May 23. *COLLINS, L. J.* This case appeared to raise a point of some difficulty, upon which the authorities were not easy to reconcile, and we therefore took time to look into them. The action was for trespass and conversion of the plaintiff's goods, and damages were claimed in addition for the personal annoyance caused thereby to the plaintiff.

any for other side.

After the cause was entered for trial the plaintiff became bankrupt, and on application made to GRANTHAM, J., before the jury were sworn, he stayed all proceedings, on the ground that all causes of action were vested in the trustee in the bankruptcy, *i. e.*, the official receiver. From this order the plaintiff appeals.

The general principles which determine whether a cause of action does or does not pass to the trustee in bankruptcy are well settled, and may be stated in the language of Parke, B., in *Beckham v. Drake*, 2 H. L. C. 579, 687: "What then is the proper construction of this section of the Act" (*i. e.*, § 63 of the Act 6 Geo. IV. c. 16) "according to its words and the several cases decided upon it? The proper and reasonable construction appears to me to be, that the statute transfers not all rights of action which would pass to executors (for rights incapable of being converted into money, such as the next presentation to a void benefice, pass to them), but all such as would be assets in their hands for the payment of debts, and no others — all which could be turned to profit, for such rights of action are personal estate. Of such the executor is assignee in law; and the nature of the office and duty of a bankrupt's assignee requires that he should have them also. But rights of action for torts which would die with the testator, according to the rule 'Actio personalis moritur cum persona,' and all actions of contract affecting the person only, would not pass. Of such the executor is not assignee in law; and, whatever may be the reason of the law which prohibits him from being so, it seems equally to apply to a bankrupt's assignee. It is admitted in the present case that the

¹ In the following cases the right of action was held personal and not to pass: Malicious prosecution: *Re Haensell*, 91 Fed. Rep. 355; *Wright v. First Nat. Bank*, 18 B. R. 87, 89; *Noonan v. Orton*, 34 Wis. 259 (see also *Francis v. Burnett*, 84 Ky. 23); personal injuries caused by negligence: *Stone v. Boston & Maine R. R.*, 7 Gray, 539 (see also *Rice v. Stone*, 1 Allen, 566; *Bennett v. Sweet*, 171 Mass. 600); negligence of an attorney leading to the debtor's imprisonment: *Wetherell v. Julius*, 10 C. B. 267; slander or libel: *Benson v. Flower*, W. Jones, 215; *Dillard v. Collins*, 25 Gratt. 343; *North v. Turner*, 9 S. & R. 244, 249; *Dowling v. Browne*, 4 Ir. C. L. 265; malicious attachment or distress, or other abuse of legal process: *Stanley v. Duhurst*, 2 Root, 52; *O'Donnel v. Seybert*, 13 S. & R. 54; *Sommer v. Wilt*, 4 S. & R. 19, 28; seduction: *Buss v. Gilbert*, 2 M. & S. 70; fraudulent representations: *Re Crockett*, 2 Ben. 514; *Re Brick*, 4 Fed. Rep. 804; *Tufts v. Mathews*, 10 Fed. Rep. 609 (see also *Shoemaker v. Kelley*, 2 Dall. 213; *Byxhie v. Wood*, 24 N. Y. 607); the right to disaffirm a contract made by the bankrupt when a minor: *Mansfield v. Gordon*, 144 Mass. 168.

The right of action has been held to pass in the case of conversion: *Ouchterlong v. Gibson*, 5 M. & G. 579; *Lovell v. Hammond Co.*, 66 Conn. 500; or trespass to goods: *North v. Turner*, 9 S. & R. 244, 249. And, inconsistently with some of the American cases cited in the preceding paragraph, the English courts have held that if a property injury is the gist of the injury a right of action passes, whether based on deceit: *Hodgson v. Sidney*, L. R. 1 Ex. 313; *Twycross v. Grant*, 4 C. P. D. 40; *Warder v. Saunders*, 10 Q. B. D. 114; negligence of an attorney: *Wetherell v. Julius*, 10 C. B. 267; *Morgan v. Steble*, L. R. 7 Q. B. 611; *Re James*, 16 L. T. n. s. 127; *Cranford v. Cinnamond*, Ir. R. 1 C. L. 325; or malicious institution of bankruptcy proceedings: *Metropolitan Bank v. Pooley*, 10 A. C. 210.

A judgment, though based on a claim for infringement of a personal right, passes.

damage to the land and goods was merely nominal, and, if substantial damages could be recovered at all, it would be for the annoyance and personal inconvenience caused to the bankrupt, and it was contended, therefore, for the plaintiff that the cause of action remained in the bankrupt and did not pass to his trustee. On the other hand, Mr. Odgers contended that the action was one of trespass to the land and conversion of the chattels of the plaintiff, which imported some injury to his estate, the damages for which, even though nominal only, would, therefore, pass to the trustee, and that the annoyance, &c., was not itself a cause of action, but only damage flowing from the original cause of action, which was single and passed to the trustee. This raised a question as to the possibility of dividing a cause of action, and leaving one part to be sued on by the bankrupt and the other by the trustee, and *Brewer v. Dew*, *Rogers v. Spence*, and *Hodgson v. Sidney*, followed by *Morgan v. Steble*, were cited. It is not, however, necessary, in my opinion, to review these authorities, or to determine the vexed question left undecided by Parke, B., in *Beckham v. Drake*, and Lord Campbell in *Rogers v. Spence*, 12 Cl. & F. 700, 720; for I think this case stands clear of the difficulty which would arise where one and the same cause of action results in substantial damage to the property of the bankrupt as well as injury to his person or annoyance to his feelings. Where the damages to property by trespass and conversion are merely nominal the cause of action in respect thereof is not regarded as one affecting the value of the property passing to the trustee, so as to give him a right of action in respect thereof, but rather as a wrong personal to the bankrupt himself, which could not found an action by his trustee. This view is well put by Cresswell, J., in his opinion delivered to the House of Lords in *Beckham v. Drake*, 2 H. L. C. 579, 613, summing up the result of *Clark v. Calvert*, 8 Taunt. 742, 21 R. R. 228; *Rogers v. Spence*, and *Brewer v. Dew*. He says: "In *Clark v. Calvert*, *Rogers v. Spence*, and *Brewer v. Dew*, 11 M. & W. 625, it was decided that rights of action for trespass to land or goods in the actual possession of a trader do not pass to his assignees if he becomes bankrupt, because those rights of action are given in respect of the immediate and present violation of the possession of the bankrupt, independently of his rights of property, and are an extension of the protection given to his person, and the primary personal injury to the bankrupt is the principal and essential cause of action." Passages to similar effect in different language will be found in the opinions of the other judges. See, in particular, Parke, B., 2 H. L. C. 626; Wilde, C. J., 2 H. L. C. 634. These opinions are specially valuable coming from judges some of whom had taken part in the cases referred to,

See *Ex parte Charles*, 14 East 197; *Buss v. Gilbert*, 2 M. & S. 70; *Beckham v. Drake*, 2 H. L. C. 579; *Rice v. Stone*, 1 Allen, 566.

The question involved in the cases in this note is somewhat analogous to the question of what rights survive to the executor or are assignable at the will of the person entitled during his life. The cases on the broader question are fully collected in 44 L. R. A. 177.

and summarizing their effect, and they negative the technical ground on which alone Mr. Odgers contends that *Clark v. Calvert*, and *Rogers v. Spence*, were decided — namely, that under the then statute the assignees, unless they interfered, took no interest in land let to the bankrupt.

GRANTHAM, J., treated the action as one that could not under the circumstances give rise to “vindictive” damages, and therefore as not falling within the test applied by Lord Abinger in *Brewer v. Dew* as determining that the right to sue remained in the bankrupt. But the damages claimed here, whether the facts will support the claim or not, are technically vindictive in the sense in which Lord Abinger used the word — that is to say, they are not merely compensation for damage to land or goods, but something more, and so far as they are more, they are in character vindictive in the legal sense; but, as I have already shown, even if the damages were nominal only, the cause of action remains in the bankrupt. I am of opinion, therefore, that the action here is one in which, in the words of Cresswell, J., above cited, “the primary personal injury to the bankrupt is the principal and essential cause of action, and, though the facts, as far as one can surmise them from the pleadings and materials before GRANTHAM, J., make vindictive damages in the popular sense improbable, we should not be justified in interfering with the plaintiff’s right to have the stay removed if the cause of action is in point of law vested in him notwithstanding his bankruptcy. I think the appeal must be allowed.”¹

BECKHAM v. DRAKE.

HOUSE OF LORDS, MAY, 1847; JULY, 1849.

[Reported in 2 *House of Lords Cases*, 579.]

THIS was a writ of error upon a judgment of the Exchequer Chamber² reversing a judgment for the plaintiff of the Exchequer of Pleas,³ in an action of assumpsit. Beckham entered into an agreement with Knight and Sursey to serve them for seven years at three guineas weekly, “the party making default to pay to the other the sum of £500 by way or in nature of specie damages.” Beckham was dismissed and became bankrupt. After the bankruptcy he brought this action. The defendants pleaded his bankruptcy, to which the plaintiff demurred.⁴

BARON PARKE. The question proposed by your Lordships is, whether the plaintiff or the defendant in error is entitled to judgment.

¹ Stirling, L. J., delivered a brief concurring opinion. See *Ex parte Graham*, 21 L. T. N. S. 802, *acc.*, in addition to cases cited in *Rose v. Buckett*.

² 8 M. & W. 846.

³ 11 M. & W. 315.

⁴ The statement of facts has been abbreviated.

It was my duty to deliver the judgment of the Court of Exchequer, consisting of my brothers ALDERSON, ROLFE, my late brother GURNEY, and myself, when this case was decided by that court (8 M. & W. 846), and to assign the reasons which induced me to form the opinion then expressed. The discussion of the case on the writ of error at your Lordships' bar, and the subsequent consideration of it, and of the judgment of the Exchequer Chamber, have induced me to think that the reasons so assigned by me are insufficient.

One of the causes that has led me to doubt the propriety of that decision is, that a penalty is given for the non-performance of this agreement; for it is clear that, according to the cases of *Kemble v. Farren*, 6 Bing. 141 (see *Thompson v. Hudson* L. R. 4 H. L. 1, and others), though the sum of £500 is said to be for "specific damages," it is to be construed as a penalty; and whether that penalty would vest in the assignees under the circumstances of this case, is a question which I propose afterwards to consider. But I assume for the present that the case is in the same position as if there was no penalty; on which footing it has been argued at your Lordships' bar and in the court below. I would premise that it is not necessary to say anything upon a question discussed in the court below, whether all the defendants are liable upon a contract, though in writing, made by one in reality on his own behalf, and as agent for the others. There is now no doubt upon this point; both the courts below concur in this respect; nor was it disputed in the argument here. The principal question in the case on the above-mentioned assumption is, whether the right of action for a breach before bankruptcy of such a contract as this, for the personal services of the bankrupt, passes to the assignees.

The general question turns on the 6th Geo. IV. c. 16, § 63, which must be construed with the aid of the twelfth section, and with that of former decisions upon the repealed statutes relative to bankrupts. By that section, "all the present and future personal estate of the bankrupt, wheresoever found or known, and all property which he may purchase, or which may revert, descend, be devised or bequeathed to, or come to him before he shall have obtained his certificate, and all debts due or to be due to him, wheresoever the same shall be found or known, are assigned, and such assignment is to vest the property, right, and interest in such debts, as fully as if the assurance whereby they are secured had been made to the assignees, and they have the same remedy to recover as the bankrupt would have had."

A former section (12) enabled the Lord Chancellor to appoint commissioners, with full power and authority to make such order and direction as to the lands, moneys, fees, offices, annuities, goods, chattels, wares, merchandises, and debts, wheresoever they may be found and known. The two sections are to be read together.

It is not disputed that the rights of the assignee under the statute law are not identical with, nor are they so extensive as those of an executor, who stands in the place of his testator, and represents him as to

all his personal contracts, and is by law his assignee (Wentworth Off. Exor. 100), and, therefore, may maintain any action in his right which he himself might (Bac. Abr. Executors N). That must be understood to mean any action on a contract, for an executor never could sue for wrongs to his testator; "*actio personalis moritur cum persona*." And with respect to contracts, some exceptions have been introduced by modern decisions: *Chamberlain v. Williamson*, 2 M. & S. 408; *Kingdon v. Nottle*, 1 M. & S. 355, and 4 M. & S. 53; as explained by Lord Abinger in the case of *Raymond v. Fitch*, 2 Crompt. M. & R. 598, 599; and the executor cannot sue upon contracts the breach of which is a mere personal wrong. The executor takes all the other personal rights of a testator, as a consequence of his representative character, whether they are available for the payment of debts or not, for his liability to pay debts is the consequence, not the object, of the appointment. The assignee is created by statute, for the purpose of recovering and receiving the estate, and paying the debts of the bankrupt, and takes only what the statute gives for that purpose. What then does it give? It clearly gives in the section above mentioned, not merely all personal chattels, securities for money, and debts properly so called, but all unexecuted contracts which the assignee could perform, the performance of which would be beneficial to the bankrupt's estate. These are "personal estate." The assignee takes, in the language of Lord Tenterden in *Wright v. Fairfield*, 2 B. & Ad. 732, all "the beneficial matters" belonging to the bankrupt; or, as Mr. Justice Buller said, "anything belonging to the bankrupt that can be turned to profit." *Smith v. Coffin*, 2 H. Bl. 462.

This contract, if unexecuted, would clearly not have passed to the assignees. But the question is, not whether the contract, but whether the right of action for the breach of it before the bankruptcy, passed. The words "personal estate" clearly comprise all chattels, chattel interests, and all the subjects mentioned in the twelfth section; and they also comprise some rights of action which are not properly debts, and would not pass under the word "debts," but do pass under the description of "personal estate."

For instance, some actions for torts do pass. Actions for injuries to personal chattels, whereby they are directly affected, and are prevented from coming to the hands of the assignee, or come diminished in value, undoubtedly pass. The action of trover for a conversion before the bankruptcy is a familiar instance of this.

On the other hand, rights of action for injuries to the person, or reputation, or the possession of real estate, do not pass. Actions of assault, for example, and for defamation, actions on the case for misfeasance, doing damage to the person, for trespass *quare clausum fregit* (*Rogers v. Spence*, 13 M. & W. 571; affirmed in this House, 12 Clark & Finnelly, 700), actions for criminal conversation with the wife, or seduction of the servant or daughter of the bankrupt, are not transferred to the assignee, even though some of these causes of action may

be followed by a consequential diminution of the personal estate, as where by reason of a personal injury a man has been put to expense, or has been prevented from earning wages or subsistence; or where by the seduction the plaintiff has been put to expense. Howard v. Crowther, 8 M. & W. 601. But with respect to contracts; rights of action for the breach of such as directly affect the personal estate, whereby the assignee is prevented from receiving part of it, or its value is diminished, are certainly transferred; as for example, rights of action on a beneficial contract, whereby one engaged to sell and deliver goods to the bankrupt, and which, if performed, would have put him in the possession of the goods, or a contract with another to carry or take care of the goods of the bankrupt which are lost, or injured, and thereby diminished in value.

On the other hand, actions for the breach of contracts personal to the bankrupt, unaccompanied by an injury to the personal estate, as a contract to carry him in safety, to cure his person of a wound or disease, or a contract with a person, who subsequently becomes bankrupt, to marry, are certainly not assigned. This is conceded; but it is questioned on the part of the defendant in error, I think without sufficient ground, whether the assignee would not be entitled to sue in any of these cases, if the personal estate was consequently damaged, as where the bankrupt was put to expense by the breach of contract, or lost the power of earning money.

What then is the proper construction of this section of the Act, according to its words and the several cases decided upon it? The proper and reasonable construction appears to me to be that the statute transfers not all rights of action which would pass to executors (for rights incapable of being converted into money, such as the next presentation to a void benefice, pass to them), but all such as would be assets in their hands for the payment of debts and no others,—all which could be turned to profit, for such rights of action are personal estate. Of such the executor is assignee in law; and the nature of the office and duty of a bankrupt's assignee requires that he should have them also. But rights of action for torts which would die with the testator, according to the rule, *actio personalis moritur cum persona*, and all actions of contract affecting the person only, would not pass. Of such the executor is not assignee in law; and whatever may be the reason of the law which prohibits him from being so, seems equally to apply to a bankrupt's assignee.

According to this rule, the description of contracts upon which the right of action is transferred, would include, but would not be restricted to, such as directly affect some chattel or subject of property which would pass to the assignees, or to such as would, if they had been performed, have produced such property, which alone, it was argued at your Lordships' bar, would be transferred by the statute; and this was in accordance with the view I took in the court below. I think, upon subsequent reflection, that this is too narrow a construction of the

statute, and that it applies to all contracts for the breach of which an executor could sue, which could be turned to profit for the payment of creditors. And if this be the true construction of the statute, if all the damages for this breach of contract could have been recovered by an executor, the assignee could recover them, and the plea would be a good plea in bar.

But if part was recoverable for the personal inconvenience of the bankrupt, a different question presents itself. I think this contract cannot be said not to relate in any part to the person of the bankrupt, but that his personal inconvenience and trouble in looking out for a new employment would be part of the damages recovered. If so, that part could not be transferred to the assignees, and ought not to be lost; the right to those damages, which would be lost in the case of a testator's death altogether, continues in the bankrupt. It is upon this point that the case appears to me to turn. Who then are to sue for the breach of contract where part belongs to the assignee, part to the bankrupt? Who would have to sue if the contract was to cure the bankrupt of a disease, and give him a sum of money, and there had been a breach of both parts, which appears to me to be a similar question? It is extremely difficult to say in whom the right of action would be.

R

Either the right of action on the contract must be divided, and each sue, or the right of action altogether must remain in the bankrupt, or altogether be transferred to the assignees, or both must join, the contract being entire, to sue for the damages. In the first two cases the plea would be good, in the last two bad; for in the first it would be no answer to the entire cause of action; in the second, it would be no answer to any part. I should feel considerable difficulty in deciding the question, but this case does not depend upon it, for I have now to consider what the effect of the penalty is.

This subject was not discussed at your Lordships' bar, and was little adverted to in the court below.

At common law the penalty would have been forfeited, and, being a sum certain, would have passed to the assignees; for, at the time of the bankruptcy it would have been uncertain whether the defendant would ever have filed a bill for relief, supposing he could have done so; and a sum certain, defeasible on an uncertain event, would have been, until defeated, personal estate, and would certainly vest in the assignees. But the question is, whether the Stat. 8 & 9 Wm. III. c. 11, has not made an alteration. That statute in effect makes the bond a security only for the damages really sustained. If all the damages would be recoverable by the assignees, the penalty would pass; if none, the penalty could not be levied, and therefore could not be available for the payment of creditors, and probably would not pass to the assignees. If part of the damages could be recovered by the assignees, and part not, the question is different. The penalty would then be a security for damages partly belonging to the assignees, partly to the bankrupt. It would be like the case of a bond to the bankrupt con-

ditioned not to assault him, and to pay him a sum of money, forfeited in both respects before the bankruptcy; and I have had some difficulty in saying whether the right of action on such a bond would or would not pass to the assignees.

But it seems to me to be clear that the penalty, which is an entire thing, could not be divided, so that each could sue for a part; and it could not be predicated what part would pass to each. It follows, therefore, that either the right to the entire penalty must remain in the bankrupt, or that either both the bankrupt and the assignee must join, as being both interested, or that the right to sue goes to the assignees, in order to secure such part of the damages as is the personal estate of the bankrupt vested in them. I cannot help thinking that both ought to sue, as they would do if the bankrupt before his bankruptcy had assigned a part of an entire debt as a security to a creditor, and consequently was a trustee for him for that part. But, at all events, I do not think the right to the penalty would remain in the bankrupt; and therefore, the plea is a good plea, as it shows that the bankrupt could not sue alone. D

Therefore, in either view of the case, I now think the judgment of the Court of Exchequer should be reversed, and the judgment of the Exchequer Chamber affirmed. If the whole of the damages are part of the personal estate which passed to the assignees, the plaintiff was barred; if some were, and some were not, still for the reasons before mentioned the plea appears to me to be good, and my opinion which I expressed in the court below was wrong.

My opinion now, therefore, is, that the plea of the plaintiff's bankruptcy is a good bar, and that the judgment of the Exchequer Chamber ought to be affirmed.¹

GIBSON v. CARRUTHERS.

EXCHEQUER, MAY 3, 1841.

[Reported in 8 Meeson & Welsby, 321.]

PARKE, B. In this case the assignees sue on a contract made between the defendant and the bankrupt, by which the bankrupt contracts to charter and send a vessel from London to Odessa, and the defendant to sell, and ship on board there, on the arrival of the vessel, a cargo of linseed, the bills of lading for which were to be made deliverable to the defendant's order (so as to preserve his lien for the price), and the bankrupt was to pay the price in ready money, on receiving the invoice.

¹ WILLIAMS, ERLE, CRESSWELL, WIGHTMAN, MAULE, JJ., WILDE, C. J., and, in accordance with their views, LORDS BROUGHAM and CAMPBELL delivered opinions in favor of the defendant. PLATT and ROLFE, BB., delivered opinions in favor of the plaintiff.

and bills of lading in London. The declaration assigns as a breach, the non-shipment of the cargo at Odessa, where the vessel arrived after the bankruptcy, of which it is stated the defendant had notice. — The plea avers that the assignees did not, within a reasonable time after the bankruptcy, and after the arrival at Odessa, give notice to the defendant of their intention to adopt the contract; and there is a demurrer to this plea, which raises two questions, — first, whether the matter contained in the plea is an answer to the action; and secondly, whether the declaration discloses a good cause of action.

I am of opinion that the assignees are entitled to recover.

There can be no doubt that the effect of the assignment under 6 Geo. IV. c. 16, §§ 12, 63, is to vest in the assignees, to use the language of Lord Tenterden in *Wright v. Fairfield*, 2 B. & Ad. 732, every beneficial matter belonging to the bankrupt's estate, and, amongst the rest, the right of enforcing unexecuted contracts, by which benefit may accrue to that estate, and such as may be performed on the part of the bankrupt by the assignees: such, in short, as would pass as part of his personal estate to his executors if he had died, which would not include that description of contract where the personal skill or conduct of the bankrupt would form a material part of the consideration. In order to enforce these contracts, it is only necessary that the assignees should perform all that the bankrupt was bound to perform, as precedent or contemporary conditions, at the time when he was bound to perform them, and the bankruptcy has no other effect on the contracts than to put the assignees in the place of the bankrupt, neither rescinding the obligations on either party, nor imposing new ones, nor anticipating the period of performance on either side.

If the assignees do all that the bankrupt ought to have done, they may recover against the contractor the damages which the bankrupt himself could have recovered if he had performed his contract; if they omit to do so, they lose the benefit of the contract, and the other contracting party has his remedy against the bankrupt, to which the certificate is no bar. *Boorman v. Nash*, 9 B. & C. 145.

To apply this to the present case, the bankrupt having already performed the first part of his contract, by sending a ship to Odessa, the next thing was that the ship should be ready to receive the cargo on board. This was also done, and as the defendant refused to load the ship, there was a breach of contract, for which the assignees could sue, for the performance of it would have been beneficial to the bankrupt's estate, and would have been the only mode by which the outlay in chartering and sending the vessel could be repaid. The assignees were not bound to pay, or to be ready to pay, the price until the arrival of the cargo in London, and delivery of invoice and bill of lading — a period which had not yet arrived. This part of the case appears to me to be perfectly clear, and consequently the plea, which is framed on the supposition that the law requires the assignees to give express notice, in a reasonable time after the bankruptcy, of their adop-

tion of the contract, is bad. The law only requires them to perform the bankrupt's part of it as and when he should have done it himself.

But it is said that the declaration itself discloses a sufficient reason for the non-performance of the contract, because it states the bankruptcy, and notice of it, before the time for loading the cargo; and it is said that by analogy to the doctrine of stoppage *in transitu*, the defendant might, on the receipt of that notice, decline to proceed to fulfil the engagement on his part.

But the doctrine of stoppage *in transitu* applies only to the case of goods sold and delivered; for the delivery to a carrier or middleman is a delivery to the party, and in cases of bankruptcy and insolvency the law, founded on an equitable principle, permits the unpaid vendor, at any time before the arrival of the goods at their place of destination, or the vendee's actual possession, to resume possession and put himself in the same position as if he had not parted with it (whether it enables him also to rescind the contract is a point yet unsettled, and which I need not now discuss).

But this privilege in case of bankruptcy or insolvency (for it belongs to both alike), has never yet been extended further than to allow resumption of possession after the contract was complete by delivery, and to undo as it were the delivery; there is no trace of any authority for saying that bankruptcy or insolvency excuses the party contracting with the bankrupt from performing any other unexecuted part of his contract.

To allow a person to retire from his agreement before it is executed and the goods ready to be delivered, is to deprive the bankrupt, and those who represent him, of all power to have the goods, on payment of the stipulated price, and would work the greatest injustice where the bankrupt had already incurred expense.

If there were a contract to build a vessel for the bankrupt, he supplying a part of the timber, and paying the price by instalments, the last on delivery, and the bankruptcy occur after the timber has been supplied, and some instalments paid, and before the vessel is complete, it could not be contended for an instant that the builder could refuse to complete his contract on the ground of that bankruptcy, and render all the previous expense of the bankrupt unavailing; and yet that case is in principle similar to the present. The bankrupt has incurred the expense of chartering a ship; is the defendant to be at liberty to refuse to perform what he has engaged to do, on the speculation that the bankrupt or his assignees will not pay? The amount of the bankrupt's expense is immaterial, and it might happen, in the case of articles of great bulk, that the cost of the vessel out and home constituted a very large part of the value of the goods here; is the bankrupt to incur the expense, and the defendant to be at liberty to refuse to deliver on board and throw the whole of it on the estate?

It appears to me that these questions must be answered in the negative.

The only authority cited in the argument for the position, that, in case of an unexecuted contract, an intervening bankruptcy excuses the performance, is the case of *Marsh v. Wood*, 9 B. & C. 659. It is enough to say that it was decided on the ground that the property in the subject-matter of the dispute was, by the bankruptcy, taken out of the bankrupt, and the submission was therefore no longer mutual, and not on the principle that bankruptcy dissolves the contract.

For the above reasons I am of opinion that the plaintiff is entitled to our judgment on this demurrer.¹

LORD ABINGER, C. B. . . . Upon this contract it is manifest that the defendant was to part with the possession of his goods of great value, upon the faith that the buyer, at a future day, when the bills of lading should arrive in London, would pay him for them. If he had actually shipped the goods before he had notice of the bankruptcy, and the bankruptcy had occurred afterwards, I think he might have stopped the goods in their progress to the buyer, had it been in his power to do so; and if the goods had actually arrived at their destination he might still have refused to hand over the bills of lading and invoice till the price was paid. The question then is, whether, under the actual circumstances, he was compellable by law, knowing that the bankrupt could not pay him, to expose himself to the risk of freight and insurance, and sending his goods perhaps to a falling market, upon the chance only of its suiting the interest or the pleasure of the assignees to pay him. For it has not yet been contended that they were bound, or could have been compelled, to pay him.

I am of opinion that it follows from the right of the vendor to stop the goods *in transitu*, if he hears of the bankruptcy of the vendee before their delivery, that he has, *à fortiori*, a right to refuse to part with the possession of them at all, if he has notice of the bankruptcy whilst they remain in his actual possession. I think that the mere insolvency of the vendee would have been a bar to any action brought by him under these circumstances; and if he could not, by reason of his mere insolvency, have maintained an action for the refusal to ship the goods, that no right to maintain such an action vested in his assignees by the event of his subsequent bankruptcy. . . .

If indeed it were true that the assignees of a bankrupt might maintain an action to recover damages for the non-delivery of goods sold to the bankrupt, numerous cases must have occurred in which it would have been their interest to do so. But not only has no such action been brought, but I am not aware of any dictum to that effect previously to that of Lord Tenterden, in the case of *Boorman v. Nash*, where, in support of an action clearly maintainable against the bankrupt for damages which could not be proved under his commission, by reason of his refusal to accept oils sold to him before his bankruptcy, to be delivered at a period which arrived after his bankruptcy, that learned judge is made to say that the contract was not rescinded by the bankruptcy

¹ ROLFE and GURNET, BB., delivered concurring opinions.

(which in one sense is true), and that the assignees might have enforced it if they had thought fit; from which last part of that dictum I must beg leave entirely to dissent, as being altogether inconsistent and irreconcilable with any principle on which the right of stoppage *in transitu* can be founded. Generally speaking, bankruptcy is no discharge of the bankrupt from an executory contract made before the bankruptcy, and which he is free to perform afterwards. There may possibly be many cases which ingenuity may suggest, where, from the nature of the contract and the circumstances attending it, the solvent party as well as the bankrupt may be liable in equity and at common law to the performance of it, or to the payment of damages. Each of these cases will depend on its own circumstances, which no doubt will develop some rule or principle of law or equity by which the particular case is to be governed.

But there is a certain class of contracts in which it is manifest that bankruptcy must put an end to all claim of the bankrupt or his assignees to the performance of them by the solvent party. The contract of partnership is a familiar instance; and in every case where the motive or consideration of the solvent party was founded, wholly or in part, upon his confidence in the skill or personal ability of the bankrupt, if the bankrupt, from his circumstances, is unable to perform his part, the assignees, as it appears to me, are not entitled to substitute either their own capacity or skill or credit for that of the bankrupt. Suppose, for example, that a man of wealth, by way of encouraging bankers whom he wishes to patronize, should agree with them for a certain term of years to keep his cash with them, upon the faith of which agreement they take a shop, purchase strong boxes, and incur other expenses necessary to carry on the trade. Upon their bankruptcy, their assignees would surely have no right to insist upon keeping his cash for the remainder of the term, or upon their right to find him a banker. An instance of another kind, but depending on the same principle, occurred between the late Sir Walter Scott and his booksellers, who had become bankrupts.

He had engaged to write a novel, which they were to have the benefit of publishing, in consideration of which they were to pay him £4,000, for which they had given him their acceptances in anticipation. Before the work was finished they became bankrupt, whereupon Sir Walter Scott took up all the bills he had negotiated. Upon the conclusion of his work, when it was ready for the press, the assignees contended, that by virtue of the contract they had a right to the profit of publishing it, which they were ready to undertake. Sir Walter Scott suggested several grounds to show that the credit, the skill, the judgment, integrity, and personal character and reputation of a publisher were matters of great importance to an author, on which the success and reputation of his works might greatly depend, and therefore insisted that, the consideration for his contract having respect to the personal credit and qualities of the bookseller, he was by their bankruptcy discharged from

his contract. I must own that his reasoning appeared satisfactory to me; but a more obvious illustration of the principle on which it rested would have been afforded by reversing the case, and supposing that Sir Walter Scott had been the bankrupt and his booksellers solvent, would they have been content to pay their £4,000, and take the risk of publishing a novel written by the assignees of the novelist? Without, therefore, presuming to suggest any rule that would govern all possible contracts upon the event of the insolvency of either party, I shall confine myself to the single case of a contract for the sale of goods, where the bankruptcy or insolvency of the buyer intervenes before the period for the payment has arrived, and before the goods have come to the actual possession of the buyer or his assignees, or to the ultimate place of their destination. In other words, I confine myself to the single case where the right of stoppage *in transitu*, after the transit has commenced, may be exercised; and it appears to me very plain that wherever that right may be exercised, it is a proof, *à fortiori*, that the vendor is discharged by the insolvency of the vendee from the obligation of delivering the goods at all, and consequently from the obligation of making the transitus commence.

If it be necessary to look for any principle on which this right depends, it may be found in the implied condition in every sale of goods, that the buyer, if he lives, or his estate, if he dies, will be able to pay for them. To him, and to his ability alone, the vendor trusts, and he is not bound to take the credit of any other man. He may, if he think fit, despatch the goods to the assignees upon their request, and take them for his paymasters; but if he does so he makes a new contract with them. In the case where the vendor is not to part with his personal possession of the goods till he is paid, it is clear that neither the bankrupt nor his assignees can have the goods without payment. Their credit is no part of the contract, and the position of the vendor is not changed by the insolvency. But where the goods are to be paid for at a future day, or where the vendor is to part with the actual possession of them by sending them by a carrier, though he is to receive the money upon delivery after their arrival, in either of these cases he trusts to the credit of the bankrupt: the assignees are not bound to pay for the goods when they arrive. The vendor has not contracted either to give them credit or to take the risk of their responsibility or their pleasure. The only consideration for his agreement to despatch the goods is the credit he gives to the personal ability of the vendee to pay for them when they arrive, and if that consideration fails, the contract is voidable at his pleasure. By the law of France . . . it is provided that the syndics of the insolvent are entitled to a delivery of goods stopped *in transitu*, if they will pay the vendor the full price the bankrupt has agreed for. This is a positive rule, and it must be understood that they are to make actual payment, and not to substitute their credit or that of any other man for that of the bankrupt, for that would be a new contract. The rule applies to a case of actual stoppage *in transitu*,

where, to a certain extent, the vendor has acted upon the credit of the vendee, and not to the case of a notice of bankruptcy before the goods are despatched. . . .

I consider the absence of all example of the assignees of a bankrupt vendee bringing an action for the non-delivery of goods a very cogent proof of the opinion which has prevailed on this subject. But there is a case of an action brought by an insolvent vendee against the vendor, the decision of which goes the full length of establishing the position I have laid down, that the insolvency of the vendee discharges the vendor from the obligation of parting with the goods upon credit. It is the case of *Reader v. Knatchbull*, tried at the Sittings at Westminster after Hilary Term, 1786, before Mr. Justice Buller. "The plaintiff declared upon an agreement by the defendant to deliver him a quantity of Manchester cottons. The defence was, that after making the contract, the plaintiff had compounded with his creditors. Mr. Justice Buller directed the jury that if they believed the plaintiff was really in such a situation as to be unable to pay for the goods, that was a good defence in point of law to the action; and the jury accordingly found a verdict for the defendant." A note of this case will be found in the report of *Tooke v. Hollingworth*, 5 T. R. 218.

This authority ought to be deemed conclusive upon a question in which common sense and common justice point to the same conclusion. Now to apply the principle to the present case. Is it a case in which the vendor, after the commencement of the transitus, might have stopped the goods and prevented their delivery to the bankrupt? That it is so is proved by the case of *Bohtlingk v. Ellis*, already cited, in which, though the vendee, by the contract, was to charter a ship and send it for the goods, and though the goods were accordingly shipped in that vessel, it was held that the vendor might still exercise the right of stopping *in transitu*; that case is indeed exactly similar to the present, in all points but one, which makes this a stronger case for the exercise of the right, and that point is, that by the contract, here the vendor was to retain the bills of lading in his own hands till they were exchanged for the money. It is the case, therefore, of a contract to sell goods to be delivered at a future time, before which the vendee becomes bankrupt. If, therefore, the vendor should ship the goods before he has notice of the insolvency, he has a right to stop their delivery to the insolvent, who cannot pay him for them. Is he bound, then, after previous notice of the bankruptcy, to send the goods upon the chance that the assignees may take them and pay him? Surely not; the assignees are under no obligation to pay him; they may refuse to take the goods and leave them on his hands. He is, therefore, according to the opinion of the other members of this court, reduced to this dilemma, that he is bound to send the goods to London, there to take the chance of market, which, if favorable, may tempt the assignees to receive them and pay the price; if unfavorable, must bring a loss upon him, even of the whole, should the price not be equal to the freight. Whereas the very object of his contract was, to sell for a fixed price, and have nothing to hazard.

Under these circumstances it appears to me that he was discharged by the insolvency of the vendee from the obligation to send forward the goods at all; that according to the case above referred to, he would have had a good defence against the insolvent, had he, being insolvent, brought an action for the refusal to ship the goods before his bankruptcy; and consequently that no cause of action for not shipping the goods vested in the assignees.

I observe the declaration is so framed as to embrace the alternative of a right of action in the assignees upon the original contract, and a right of action derived from their notice that they would perform the contract in place of the bankrupt. But if no right of action existed in them to compel the shipment of the goods the declaration is bad; and I am of that opinion.

But if it could be supposed, which I think it cannot, that any right of action could arise out of their notice that they were ready and willing to receive and pay for the goods, then, as such notice must have been given in reasonable time, the plea which alleges that it was not given in reasonable time must be good, so that in either case the judgment on the demurrer ought to be for the defendant.

I would add only one remark, to distinguish the case of an executor from that of an assignee. A party contracting to sell goods must contemplate the existing and continuing solvency of the vendee till the goods are paid for, but he cannot contemplate the continuance of his life, so as to make that an implied condition of the delivery. He contracts, therefore, in point of law, with the vendee and his executors, but not with the vendee and his assignees.

Judgment for the plaintiffs.¹

¹ Compare, as to the duty of a solvent contractor to tender performance to a co-contractor who is insolvent, or his assignee, *Ex parte Tondeur*, L. R. 5 Eq. 160; *Ex parte Agra Bank*, L. R. 9 Eq. 725; *N. E. Iron Co. v. Gilbert R. R. Co.*, 91 N. Y. 153; *Pardy v. Kanady*, 100 N. Y. 121; *Vandegrift v. Cowles Engineering Co.*, 161 N. Y. 435; *Diem v. Koblitz*, 49 Ohio St. 41.

It is well settled that credit need not be given, though the contract provides for it, if the debtor is insolvent or bankrupt. See, besides cases above cited, *Bloxam v. Sanders*, 4 B. & C. 948; *Miles v. Gorton*, 2 C. & M. 504; *Grice v. Richardson*, 3 A. C. 319; *Ex parte Chalmers*, L. R. 8 Ch. 289; *Bloomer v. Bernstein*, L. R. 9 C. P. 588; *Morgan v. Bain*, L. R. 10 C. P. 15; *Re Phoenix Steel Co.*, 4 Ch. D. 108; *Ex parte Stapleton*, 10 Ch. D. 586; *Re Wheeler*, 2 Low. 252; *Rappleye v. Racine Seeder Co.*, 79 Ia. 220, 228; *Brassel v. Troxel*, 68 Ill. App. 131; *Hobbs v. Columbia Falls Brick Co.*, 157 Mass. 109; *Lennox v. Murphy*, 171 Mass. 370, 373.

BRIGHAM, ASSIGNEE v. HOME LIFE INSURANCE COMPANY.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 15-
JUNE 30, 1881.

[Reported in 131 Massachusetts, 319.]

BILL in equity, filed March 20, 1880, by the assignee in bankruptcy of William Scollan, to recover possession of a policy of life insurance issued by the defendant company to Scollan on July 9, 1878. Hearing before COLT, J., who reported the case for the consideration of the full court. The facts appear in the opinion.

A. A. Ranney, for the defendant corporation.

T. P. Proctor, for the plaintiff, was not called upon.

MORRIS, J. The policy issued by the defendant company insures the life of William Scollan "in the amount of thirty-six hundred dollars, for the term of six years with endowment without participation in profits." By it the insurer "promises and agrees to and with William Scollan to pay the sum assured at its office in this city to him on the thirteenth day of October, 1884, or to his children," [naming them,] "share and share alike, or to the survivors or survivor of them within sixty days after due notice and proof of loss and interest, satisfactory to the company, in accordance with the terms of this contract." The first clause is an absolute promise to pay the sum assured to Scollan on October 13, 1884, if he complies with the terms of the contract. If he lives to that time, he, or his assignee, will have the exclusive right to collect the amount. The promise in the last clause, to pay to his children, was clearly intended to be an alternative promise, and to apply only in case he should die before the day when payment was to be made to him. The promise is to pay to the children "within sixty days after due notice and proof of loss," that is, after proof of the death of the insured. Construed in its connection with the absolute promise to pay Scollan at the termination of the policy, it admits of no sensible interpretation except that it is an alternative promise to pay to the children in case Scollan shall die before October 13, 1884.

This being the true construction of the contract, it is clear that Scollan had a valuable interest in this contract of insurance, which passed to his assignee in bankruptcy. The assignment in bankruptcy conveyed to the assignee "all the estate, real and personal, of the bankrupt, with all his deeds, book and papers relating thereto," with certain exceptions not material to this case. U. S. Rev. Sts. §§ 5044-5046; *Leonard v. Nye*, 125 Mass. 455; *Belcher v. Burnett*, 126 Mass. 230. All the interest which Scollan had in this policy of insurance, therefore, passed to and vested in his assignee, subject to the same contingencies in his hands as in the hands of the bankrupt. After the

assignment, Scollan had no control or power of disposition over it, and his attempted surrender and discharge of it to the defendant was inoperative and void. It still remains the property of his assignee, the plaintiff, and he is entitled to the possession of it. Scollan had the exclusive right to the possession of the policy as the evidence of his contract, both against the company and against his children, as long as he lived, and this right passed to the plaintiff. We are not called upon to consider whether the plaintiff has the right to assign this policy without the assent of the company; he has at least the right to its possession for the purpose of enabling him to collect the amount insured when it becomes payable, if Scollan shall then be living.

The remaining question is whether this court has jurisdiction in equity to compel the delivery of the policy to the plaintiff. The bill states, and the evidence shows, that the policy is secreted and withheld by the company, so that it cannot be replevied. The plaintiff has a right to the securities belonging to the estate of the bankrupt. If his only right is to collect the sum insured when it becomes payable, he is entitled to the policy as evidence, and the want of it may cause embarrassment and possible danger of failure in a suit at law. He has no plain, adequate and complete remedy at law which will fully protect and guard his rights, and is therefore entitled to maintain this bill. *Sears v. Carrier*, 4 Allen, 339; *Pierce v. Lamson*, 5 Allen, 60.

*Decree affirmed.*¹

IN RE MURRIN.

CIRCUIT COURT FOR THE EASTERN DISTRICT OF MISSOURI, 1873.

[Reported in 2 Dillon, 120.]

DILLON, Circuit Judge. The wife of the petitioner being possessed of a separate estate, secured to her by an ante-nuptial marriage settlement, applied in the spring of 1869 for two policies of insurance of \$5,000 each, upon her life, payable upon her death to her husband. They were issued accordingly, and she paid the premiums for one year, one-half in cash, and one-half by note. Before the year expired her husband was adjudicated a bankrupt. Out of her own estate she paid the premiums for the two following years, 1870 and 1871, and before

¹ *Re Steele*, 98 Fed. Rep. 78; *Re Diack*, 100 Fed. Rep. 770; *Re Boardman*, 103 Fed. Rep. 783; *Re Slingluff*, 106 Fed. Rep. 154; *Bassett v. Parsons*, 140 Mass. 169; *Waldron v. Becker*, 68 N. Y. Supp. 402, acc.; *Re Hernich*, 1 A. B. R. 713 (but see *Re Slingluff*, 106 Fed. Rep. 154, 161), *contra*. See also *Re Adams*, 104 Fed. Rep. 72.

In *Re Buelow*, 98 Fed. Rep. 86, and *Morris v. Dodd*, 110 Ga. 606, it was held that a policy having no surrender value did not pass to a trustee in bankruptcy. See also *Holt v. Everall*, 2 Ch. D. 266; *Ex parte Dever*, 18 Q. B. D. 660; *Re McKinney*, 15 Fed. Rep. 535; *Barbour v. Connecticut Mutual L. I. Co.* 61 Conn. 240; *Barbour v. Larue*, 51 S. W. Rep. 5 (Ky.). But see *Re Slingluff*, 106 Fed. Rep. 154, *contra*.

the next premium fell due she died. The question is, whether the assignee as against the bankrupt, is entitled, for the benefit of the estate, to the proceeds of the policies. The assignee does not claim that his right is strengthened by reason of having obtained, in the manner stated, the actual possession of the proceeds, and the only contest is as to the respective legal or equitable right of the assignee and bankrupt thereto.

Counsel on both sides, in their well considered briefs, have argued many points which, though pertaining to the general subject of life policies for the benefit of others, are, nevertheless, not necessarily involved in the decision of the case.

The counsel for the assignee claims that at the date of the bankruptcy of the husband, November 30, 1869, the husband had a right of property in the policy (which it is contended is a *chose in action*) of such a nature that it vested in the assignee by virtue of the adjudication in bankruptcy. (Bankrupt act, sec. 14.) Under this section, property and rights which are acquired by the bankrupt after the commencements of the proceedings in bankruptcy do not vest in the assignee; and to make good his claim the assignee must show that the right to the benefit of the policy was one which not only existed in the husband at the time he was proceeded against in bankruptcy, but is one of such a nature as to vest in the assignee as of that time, by virtue of the provisions of the bankrupt act. This act should receive such a construction as accords with its well known purpose, which is, that if an insolvent debtor will surrender all his property (not exempt) for distribution among his creditors, he may, on the terms provided in the act, have his discharge. If the wife's death had happened before the bankruptcy, there being no statute protecting the husband's rights under the policy, the right to collect and hold the money would, it may be admitted, pass to the assignee. But her death did not happen until over two years afterwards, during which time the wife continued to pay the premiums. It is admitted that she could not have been compelled to pay them, either by the husband, or by the assignee. Her payment of them proceeded purely from her bounty. It is certain, to a practical intent, that if she had not paid the subsequent premiums, the first payment, made before the bankruptcy, would have been of no benefit, either to the assignee or to the husband, for she did not die during the year. It is also certain, to a practical intent, that, had the last premium not been paid, there would have been no proceeds here about which to litigate. Her intention, her object, in making these payments, in virtue of which the policy was kept in esse, must have been to make provision for her husband; and what equity, let me ask, have creditors, or the assignee representing them, to thwart the purpose which she had in view, and for which she paid her money — money to which they had no claim? The assignee, if it be conceded that he could have done so for the benefit of the estate, which I do not admit nor decide, took no steps to pay the premiums, but asks the benefit of

those paid by the wife. It is inconceivable that she made, or intended to make, the payments for the benefit of the assignee, and she doubtless died in the confident belief that she had made provision for her husband.

Without discussing the questions which have been argued at the bar as to the nature and extent, before the death occurs, of the interest of a person designated by the bounty of another as the one to whom a policy is ultimately to be paid, I am quite confident that the husband, at the time of his bankruptcy, had no such interest in these policies as to give the assignee the right to retain their proceeds against manifest intention and purpose of the wife.

Could the assignee, as against the wish of the wife, have said, "I demand the policy, and intend to keep up the premiums for the benefit of the estate"? If it were necessary to answer this question, it would seem that he had no such right, and that she could properly say, "This is a matter of my own, a provision originating in my bounty, one upon which my husband's creditors have no claim, and with which they have no right to interfere." But the assignee took no such steps; on the contrary, he allowed, or did not prevent the wife from making the payments which kept the policy alive; and I rest my judgment against him on the broad ground, that, under the circumstances of the case, the creditors, for whose benefit the money is sought, have not the shadow of a shade of equity to it, nor to defeat the provident and just provision which the wife intended to secure for her husband, not for them. The policy was kept up by her for the benefit of her husband after her death, not for the benefit of his creditors before his bankruptcy. The district judge, in deciding the case, seized the considerations which control it, when he remarked: "Looking at the nature of the contract for the insurance as being a provision by one married party for the benefit of another, and kept in force by the wife out of her separate estate without any step being taken by the assignee, her equities should be carefully regarded. The policy was for the benefit of the husband, and was kept alive by the wife after the bankruptcy, and it would be inequitable that a sum becoming payable after the bankruptcy under such a contract, should by relation back to the time of commencement of proceedings in bankruptcy, be held to belong to the assignee. The design of such charitable acts for the benefit of a third party was not intended to be defeated by the bankrupt law, in a case like the present, where such a result would be against all equity." *Affirmed.*¹

¹ *Re McDonell*, 101 Fed. Rep. 249, *acc.* But see *McElroy v. John Hancock L. I. Co.* 88 Md. 137; *Troy v. Sargent*, 132 Mass. 408.

IN RE STEELE.

DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA,
DECEMBER 12, 1899.

[Reported in 98 Federal Reporter, 78.]

SHIRAS, District Judge. From the record certified to the court in this case it appears that the firm of Steele & Co., and the partners therein, Anna M. Steele, Daniel Steele, William M. Steele, and Daniel H. Steele, have been duly adjudged bankrupts in this district, and, in the proceedings had before the referee, the question arose as to the rights of the creditors represented by the trustee in certain policies of life insurance held by the bankrupts, and from the ruling made by the referee an appeal has been taken to this court. It appears from the evidence that Anna M. Steele is the wife of Daniel Steele; that Daniel, William M., and Daniel H. Steele are and were, when the proceedings in bankruptcy were instituted, head of families, and were then, and are now, citizens and residents of the State of Iowa. Of the policies in question, three are on the life of Daniel Steele, two on the life of William M. Steele, and one on the life of Daniel H. Steele.

Under the broad provisions of section 1805 of the Code of Iowa, none of these policies could be now subjected to process in favor of creditors, or be rendered available to the creditors by proceedings other than those instituted under the bankrupt act; and, as the policies are exempt from liability to creditors by this provision of the State statute, it is earnestly contended that they must be held exempt in the bankruptcy proceedings by reason of the declaration contained in section 6 of the bankrupt act, to the effect that the act shall not affect the allowance to a bankrupt of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition. In the case of *In re Lange* (D. C.), 91 Fed. 361, I held that the general provisions of section 6 of the act were limited and controlled by the exception contained in section 70, and that, construing the two sections together, it must be held that, where a bankrupt held a policy payable to himself, his heirs or legal representatives, the surrender value thereof would be part of the assets of his estate in bankruptcy.

While I freely admit that the question is not free from doubt, I shall adhere to the view expressed in the *Lange* Case of the meaning of the statute; and therefore the remaining question is, what is the result of the application of this rule to the policies involved in this case? ¹

The policy issued by the Mutual Benefit Life Insurance Company upon the life of Daniel Steele, numbered 109,795, for the sum of \$2,000, is payable to Daniel Steele, his executors, administrators, or assigns.

¹ Reversed on this point by the Circuit Court of Appeals. *Steele v. Buel*, 104 Fed. Rep. 968.

The surrender value of this policy is payable to the bankrupt, no other person having any interest in the policy or its proceeds, and the policy will therefore become part of the assets of the bankrupt's estate, unless he avails himself of the right to pay or secure the surrender value to the trustee.

There are two policies issued by the Mutual Life Insurance Company of New York, — one numbered 31,523, for the sum of \$2,000, and one numbered 47,739, for the sum of \$3,000. In form, these policies are contracts between Anna M. Steele and the insurance company, the life insured being that of Daniel Steele, the husband of Anna M. By the terms of the contract, it is Anna M. Steele who is bound to pay the annual premiums, and she is the person to whom the proceeds of the policy are made payable. Under these circumstances, Mrs. Steele would be entitled to the surrender value of the policies, if the same were now terminated, and she alone could contract with the company to terminate the same by receiving the surrender value thereof. These policies are therefore the property of Mrs. Steele. They have a surrender value, payable to her, and, as she is one of the bankrupts, these policies are part of the assets of her estate to which the trustee is entitled, unless the surrender value is paid or secured to him by the bankrupt.

The policy on the life of William M. Steele issued by the New England Mutual Life Insurance Company, numbered 105,575, for the sum of \$5,000, is in the nature of an endowment policy; it being therein provided that, at the end of forty-eight years, the principal sum shall be paid to William M. Steele, if then living, but in case of his death before that date, the amount should be paid to his wife. The surrender value of a policy of this form is clearly payable to William M. Steele, the bankrupt, and therefore the policy will pass to the trustee, unless the surrender value is settled with him as provided for in the act.

The remaining policy on the life of William M. Steele is in the Penn Mutual Life Company, numbered 102,082, for \$5,000, and is payable to his wife, Gracie. The wife is the beneficiary of this policy, and, as she is not one of the bankrupts, her interest therein cannot be destroyed by treating the policy as part of the estate of her bankrupt husband. This policy must be deemed to be her property, in which the trustee has no interest.¹

The remaining policy is one issued by the Northwestern Mutual Life Insurance Company in the sum of \$5,000, numbered 322,790, on the life of Daniel H. Steele; the company contracting to pay the sum named in the policy to the executors, administrators, or assigns of Daniel H. Steele. Under date of May 21, 1895, Daniel H. Steele, by

¹ *Ex parte Merrett*, 7 Morrell, 65; *Re Bear*, 11 B. R. 46; *Belt v. Brooklyn L. I. Co.*, 12 Mo. App. 100, *acc.* See also *Re Dews*, 96 Fed. Rep. 181; *Pace v. Pace*, 19 Fla. 438; *Day v. New England L. I. Co.*, 111 Pa. 507. The laws of many States expressly exempt such policies. See *Baron v. Brummer*, 100 N. Y. 372; *Stokes v. Amerman*, 121 N. Y. 337; *Bennett's Case*, 6 Phila. 472.

a writing duly executed and attached to the policy, assigned the same to Helen B. Stafford, to whom he was then engaged to be married, and who is now his wife. The effect of this assignment was to make the policy one payable to the wife of the insured. She became the beneficiary thereof, and is entitled to the proceeds of the policy. This assignment was made in 1895, long before the adoption of the bankrupt act, and there is nothing to impugn the good faith of the transaction. I therefore hold that this policy is not part of the assets of the bankrupt Daniel H. Steele, and the trustee has no interest in or right thereto. Unless, therefore, the bankrupts promptly exercise their right to pay or secure to the trustee the surrender value of the policies in the Mutual Benefit, the Mutual Life, and the New England Companies, the same will become assets of the estate in the hands of the trustee. The referee, upon receiving this opinion, will at once send notice by mail to the bankrupts of the ruling of the court, which affirms the rulings of the referee from which the appeal was taken.

DUSHANE v. BEALL.

UNITED STATES SUPREME COURT, MARCH 2-16, 1896.

[Reported in 161 *United States*, 513.]

THIS was a garnishee proceeding in the Court of Common Pleas for Fayette County, Pennsylvania.

The record of that court shows the issue in favor of Alpheus Beall, on a judgment recovered by him against Abraham O. Tinstman, or an attachment execution, dated June 9, 1888, and service thereof accepted by the Pittsburgh and Connellsville Railroad Company, as garnishee, June, 15, 1888.

August 10, 1888, McCullough, assignee in bankruptcy, appeared in the garnishment proceeding and participated in the choice of arbitrators, who made an award September 25, 1888, in favor of Beall, from which award an appeal was taken. December 13, 1889, the case was continued "on account of death of assignee of A. O. Tinstman; said case not to be again placed on trial list until after appointment and appearance of another assignee in bankruptcy." April 23, 1890, "Edward Campbell, Esq., appears for J. M. Dushane, assignee in bankruptcy of A. O. Tinstman." September 11, 1890, "Joshua M. Dushane, assignee of A. O. Tinstman, appears in court and asks leave to be added to the record as defendant." Thereafter the case was submitted to the court for determination on a case stated, which embodied the following facts:—

On the 5th of April, 1876, Abraham O. Tinstman was adjudicated a bankrupt in involuntary proceedings in bankruptcy, and during the

same month Welty McCullough was appointed assignee, and took upon himself the duties thereof. The deed of the register in bankruptcy to the assignee conveyed the property which Tinstman possessed, was interested in, or entitled to, on the fifth day of April, but the schedule of assets filed by the assignee did not embrace the bankrupt's interest in a certain telegraph line hereinafter mentioned. Tinstman was duly discharged as a bankrupt, January 3, 1877.

In 1882, James L. Shaw instituted an action against the Pittsburgh and Connellsville Railroad Company in the Court of Common Pleas for Fayette County, Pennsylvania, to recover damages for a breach of contract relative to the maintenance and working of a line of telegraph between Uniontown and Connellsville, and on October 2, 1885, Tinstman was made one of the "use plaintiffs" therein.

After his discharge, Tinstman engaged in business, and became indebted to Alpheus Beall in the sum of \$730.54, for which a judgment was rendered against him November 24, 1886, in said Court of Common Pleas.

Shaw recovered judgment against the railroad company for a considerable amount, covering damages from January 1, 1874, to September 1, 1887. Of these damages, the sum of \$947.73 was Tinstman's share on account of an interest in the line of telegraph, which became his property "by subscription and payment therefor in the year 1865." McCullough died August 31, 1889, Joshua M. Dushane was appointed assignee in his place December 14, 1889, and intervened in this case, as such, September, 11, 1890.

The Court of Common Pleas ruled that the assignee had lost any right to the fund by reason of delaying claim thereto for an unreasonable time; and also that the limitation of two years prescribed by section 5057 of the Revised Statutes of the United States applied; and entered judgment in favor of Beall and against the railroad company as garnishee for \$947.43, "the debt due by said garnishee to said Tinstman." The case was taken to the Supreme Court of Pennsylvania, which affirmed the judgment on the ground that the delay of the assignee was fatal to his claim. 149 Penn. St. 439. A writ of error from this court was then sued out.

Mr. *Edward Campbell*, for plaintiff in error.

Mr. *Leoni Melick*, for defendant in error.

Mr. Chief Justice FULLER, after stating the case, delivered the opinion of the court.

We concur with the Supreme Court of Pennsylvania that the limitation of § 5057 of the Revised Statutes did not apply. That limitation is applicable only to suits growing out of disputes in respect of property and of rights of property of the bankrupt which came to the hands of the assignee, to which adverse claims existed while in the hands of the bankrupt and before assignment. In re Conant, 5 Blatch. 54; Clark v. Clark, 17 How. 315, 321; Phelps v. McDonald, 99 U. S. 298, 306; French v. Merrill, 132 Mass. 525.

It is well settled that assignees in bankruptcy are not bound to accept property which, in their judgment, is of an onerous and unprofitable nature, and would burden instead of benefiting the estate, and can elect whether they will accept or not after due consideration and within a reasonable time, while, if their judgment is unwisely exercised, the bankruptcy court is open to compel a different course. *Sparhawk v. Yerkes*, 142 U. S. 1, 13; *Glenny v. Langdon*, 98 U. S. 20; *American File Co. v. Garrett*, 110 U. S. 288; *Smith v. Gordon*, 6 Law Rep. 313; *Amory v. Lawrence*, 3 Cliff. 523; *Ex parte Houghton*, 1 Low. 554; *Nash v. Simpson*, 78 Me. 142; *Streeter v. Summer*, 31 N. H. 542.¹ The same principle is applicable also to receivers and official liquidators. *Quincy, &c. Railroad v. Humphreys*, 145 U. S. 82; *St. Joseph, &c. Railroad v. Humphreys*, 145 U. S. 105; *Sunflower Oil Co. v. Wilson*, 142 U. S. 313; *United States Trust Co. v. Wabash, &c. Railway*, 150 U. S. 287; *In re Oak Pitts Colliery Co.*, 21 Ch. Div. 322, 330. And see *Bourdillon v. Dalton*, 1 Esp. 233; s. c. *Peake's N. P.* 312; *Turner v. Richardson*, 7 East, 336; *Domat*, vol. II. part 2, Book I, Title 1, sec. v.

If with knowledge of the facts, or being so situated as to be chargeable with such knowledge, an assignee, by definite declaration or distinct action, or forbearance to act, indicates, in view of the particular circumstances, his choice not to take certain property, or if, in the language of Ware, J., in *Smith v. Gordon*, he, with such knowledge, "stands by without asserting his claim for a length of time, and allows third persons in the prosecution of their legal rights to acquire an interest in the property," then he may be held to have waived the assertion of his claim thereto.

In *Sparhawk v. Yerkes* we held that as the conduct of the assignees was such as to show that they did not intend to take possession of the assets in controversy; as they avoided assuming any liability in respect thereof; and as they allowed the bankrupt after his discharge by the expenditure of labor and money to save the assets and render them valuable, they could not be permitted to assert title against him. That was a suit directly against the bankrupt, and this is in effect the same, for Beall does not appear to occupy any better position than Tinstman himself. The judgment of the Supreme Court of Pennsylvania proceeded upon the ground that the assignee delayed too long in the assertion of his claim; that the litigation against the railroad company was protracted, uncertain, and expensive; and that as the assignee did not appear to have intervened in the matter until, as is stated, December 11, 1890, although the litigation began in the summer of 1882, he must be held to have elected to abandon the claim, and could not come in at so late a day and share in the fruits of litigation carried on by others; and on that view of the facts this conclusion would seem to be correct if the record showed on the part of Tinstman's assignee knowledge of the facts or wilful blindness in relation to them.

¹ *Re Cogley*, 107 Fed. Rep. 73, acc.

The Supreme Court manifestly referred to the intervention, in this proceeding, of Dushane, as assignee, which was, according to the case stated, September 11, 1890; but McCullough had intervened as assignee August 10, 1888, and he having died August 31, 1889, the cause was continued for the appointment and appearance of another assignee.

It is said by counsel for the assignee that the original litigation was commenced April 29, 1878, by a bill in equity, filed for the benefit of all the owners of the telegraph line, which it was decided January 9, 1882, would not lie; that thereupon the action at law, which resulted in judgment, was brought July 10, 1882, in the name of Shaw alone, the contract being under seal, but for the benefit of his assigns as well, who were very numerous; that afterwards some, but not all, of the "use plaintiffs" were added to the record; and that Tinstman's assignee just as much participated in the litigation, from April, 1878, to its end in 1888, as any of the others, whether named as plaintiffs or not. The difficulty with this is that very little, if any, of the matter stated can be deduced from the record, which fails to disclose that the assignee was represented in the litigation against the railroad company, or asserted his claim to his share of the fruits thereof, whether as a party of record under Shaw or otherwise prior to his intervention in this action, August 10, 1888.

The case stated does show that Tinstman was made one of the "use plaintiffs" in Shaw's action, October 2, 1885, but there is no explanation of how that entry came to be made, and nothing to indicate notice thereof to the assignee, or to charge him with notice assuming that he was ignorant of the claim.

On the other hand, the bankruptcy proceeding was involuntary, and it appears that the schedule of assets (the term schedule being used in the case stated as the equivalent of the inventory) was made by the assignee, the law providing that the order of adjudication should require the bankrupt to deliver a schedule of creditors and an inventory and valuation of his estate, and if the bankrupt were absent or could not be found, such schedule and inventory should "be prepared by the messenger and the assignee from the best information they can obtain." Rev. Stat. §§ 5030, 5031. And this inventory, thus prepared by the assignee, the record affirmatively shows, did not embrace the bankrupt's interest in the telegraph line, as we must presume it would, if the assignee had had, or been able to obtain, information in respect thereof. Nor can we find elsewhere in the record any evidence that the assignee knew or was informed of Tinstman's interest prior to August 10, 1888. Counsel for the assignee argues that the fact is that Tinstman's interest was the ownership of certain shares of stock in the telegraph company which were included in the inventory and delivered to the assignee, but the exact contrary appears from the case stated. Nor does the fact appear, which he likewise insists upon, that the assignee not only did not abandon, but actively asserted, his claim.

The question whether the assignee in bankruptcy was entitled to

this claim was clearly a Federal question. *Williams v. Heard*, 140 U. S. 529. And if all the facts stated in the record before us do not, as matter of law, warrant the conclusion at which the highest court of the State arrived upon this question, it is the duty of this court so to declare, and to render judgment accordingly.

We must take the record as we find it, and are constrained to the conclusion that the assignee should not have been held to have exercised the right of choice between prosecuting the claim and abandoning it, in the absence of any evidence whatever to justify the conclusion that he had knowledge, or sufficient means of knowledge, of its existence prior to August 10, 1888; and that therefore there was error in the judgment.

Judgment reversed, and the cause remanded, that the judgment of the Court of Common Pleas may be reversed, and further proceedings had not inconsistent with this opinion.

LANCEY v. FOSS.

SUPREME JUDICIAL COURT OF MAINE, SEPTEMBER 13, 1895.

[Reported in 88 Maine, 215.]

AGREED statement.

The parties agreed upon the following facts:—

“The writ is dated March 14, 1878, returnable to the September Term of this court in Somerset County, 1878.

“Suit is brought upon numerous notes of Going Hathorn, the defendants’ testator, and upon an account annexed, and also upon a special contract set out in the writ.

“Copy of writ may be furnished by either party.

“Subsequently, in 1878, the plaintiff was declared a bankrupt, upon his own petition in the District Court of the United States for the District of Maine; a schedule of his assets and liabilities was filed in said court, the assets not including the claims in this writ; and an assignee was duly chosen and appointed on November 7, 1878, and on said November 7, 1878, by decree and assignment of the proper Register in Bankruptcy under the U. S. Bankrupt Act of 1867, all the estate and property of said Lancey was duly assigned to said assignee.

“The assignee never appeared in this case.

“On June 2, 1879, said Lancey was duly discharged from all his debts and liabilities and received a certificate of such discharge in usual form, from said District Court of the United States, paying about twenty-five cents on the dollar.

“If upon the foregoing facts this action can be maintained by the plaintiff, it is to stand for trial; otherwise a nonsuit is to be entered.”

S. S. Hackett, for plaintiff.

D. D. Stewart, for defendant.

Sitting: PETERS, C. J., WALTON, EMERY, HASKELL, WHITEHOUSE, WISWELL, J. J.

EMERY, J. The statement of the case shows that the plaintiff is entitled to a hearing in this court upon the merits of his claim against the defendants, unless he is prevented by some provision of the U. S. Bankruptcy Act of 1867, to which he had become subject by the bankruptcy proceedings. The defendants contend that he is thus prevented by several provisions of that act.

I. Section 5046, U. S. Rev. Stat., Title Bankruptcy, provides that all of the property of the bankrupt, including all choses in action, all debts due him, all rights and causes of action (with certain exceptions not material here), "shall in virtue of the adjudication in bankruptcy and the appointment of his assignee, be at once vested in the assignee." Section 5047 provides that the assignee may be admitted to prosecute in his own name, or that of the bankrupt, any suit pending at the time of the adjudication. This suit and the subject-matter of it are clearly within these sections.

Upon these sections and the bankruptcy proceedings the defendants base a vigorous argument, that the plaintiff was completely shorn of all title and interest in this action and its subject-matter; that the entire title and interest *ipso facto* passed to the assignee, leaving nothing in the bankrupt plaintiff; that the latter became *civiliter mortuus*, and lost the power of maintaining actions upon then existing claims as completely as one physically deceased. There are various expressions and dicta of judges which seem to state the operation of the statute as broadly as do the defendants, but we are not referred to any express decision going so far upon the language of this particular act.

Undoubtedly, by the operation of the bankruptcy proceedings under this act, the assignee is vested with the full right to take all the estate of the bankrupt, whether scheduled or not, and is vested with sufficient power and title to fully administer it in his own name, or that of the bankrupt, as he may elect. But all such property of a bankrupt is not cast upon the assignee *nolens volens*, like the personal property of a deceased intestate upon the administrator. In the latter case the title cannot remain with the deceased, but must fall on his successor. The assignee of a living bankrupt, however, may decline to take or interfere with such property as he deems onerous or worthless. The property so rejected by the assignee does not thereby become derelict, to vest in the first appropriator. The rights and obligations which the assignee declines to enforce, or notice, do not thereby vanish into nothingness.

Such items of estate, corporeal or incorporeal, as the assignee declines to appropriate or utilize, remain the property of the bankrupt, subject always to the superior right and title of the assignee. Notwithstanding the adjudication and assignment under the bankrupt act, there is left in the bankrupt a right which makes a title good against all the world

except his assignee and creditors. These may appropriate the entire title and interest, and so divest the bankrupt completely; but what they decline to appropriate remains with the bankrupt. The title does not fall to the ground between the two. If the assignee or creditors will not take it, no one else can appropriate it. The bankrupt can defend or enforce it against all others.

The above statement of the law is supported directly or incidentally by many judicial decisions. *Evans v. Brown*, 1 Esp. 170; *Chippendale v. Tomlinson*, 7 East, 57; *Temple v. London, &c. Railway Co.*, 2 Jur. 296; *Re Stafford*, 18 W. R. 959; *Herbert v. Sayer*, 5 Q. B. 965; *Fyson v. Chambers*, 9 M. & W. 460-466; *Smith v. Gordon*, 6 Law Rep. 313; *Amory v. Lawrence*, 3 Cliff. 523; *Taylor v. Irwin*, 20 Fed. Rep. 615; *American File Co. v. Garrett*, 110 U. S. 288; *Reynolds v. Bank*, 112 U. S. 405; *Laughlin v. Dock Co.*, 65 Fed. Rep. 447; *Eyster v. Gaff*, 91 U. S. 521; *United States v. Peck*, 102 U. S. 64; *Thatcher v. Rockwell*, 105 U. S. 467; *Sparhawk v. Yerkes*, 142 U. S. 1; *Sessions v. Romadka*, 145 U. S. 29; *King v. Remington*, 36 Minn. 15; *Sawtelle v. Rollins*, 23 Me., 196; *Foster v. Wylie*, 60 Me., 109; *Nash v. Simpson*, 78 Me., 142.

In this case at bar, the action with its various counts upon promissory notes, merchandise sold, etc., was pending in the Supreme Judicial Court for Somerset County at the time of the adjudication and assignment in bankruptcy. The claims here in suit were not scheduled by the bankrupt, but their existence, and the existence of this action to enforce them, were matters of public record upon the docket and files of a court of general jurisdiction. The assignee and creditors may be presumed to have known of them. The assignee, however, never appeared in the case, and does not now appear after a lapse of fourteen years. He never appropriated or took over these claims. It is an easy and natural inference that he elected not to take them, but to leave them with the bankrupt. *United States v. Peck*; *Sparhawk v. Yerkes*; *Sessions v. Romadka*, *supra*.

The defendants cannot be heard to complain of this conduct of the assignee. As to them it is *res inter alios*. The judgment in this action will protect the defendants against the assignee as effectually as if he appeared in the case. Whatever he may hereafter do to appropriate the proceeds of the suit, if any, will not affect the defendants. *Eyster v. Gaff*; *Thatcher v. Rockwell*; *Foster v. Wylie*, *supra*. If, however, the defendants desire, they can have an order of notice of this action served upon the assignee which will conclude him of record.

II. Section 5057, U. S. Rev. Statute, Title Bankruptcy, provides that "no suit either at law or equity shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee."

The defendants contend that this section bars the further prosecution

of this action. Their argument is that the assignee could not after the two years begin a suit in his own or the bankrupt's name, nor could he come into or prosecute a suit already begun by the bankrupt. Their further argument is, that every person claiming, or who must claim under the assignee, is equally barred from beginning or prosecuting suits after the two years, and that, as whatever title this plaintiff has necessarily came from the assignee, he is barred as the assignee is barred. Many cases are cited in support of these arguments. In every case cited, however, the title was held to have once passed to the assignee. It followed that the plaintiff either had no title or was barred by the two years' limitation upon the assignee. Thus in *Parks v. Tirrell*, 3 Allen, 15, cited so confidently by the defendants, the court held that the title had passed to the assignee, and that the bankrupt plaintiff could only show title from the assignee, and hence was barred equally with the assignee.

In this case at bar, as already stated, the assignee did not take over the title. He elected not to take it and left it in the plaintiff. He neither took nor passed the title. The plaintiff retained the title subject to the assignee's paramount right, but good against others until that paramount right was asserted. Therefore the cases cited do not apply. The two years' limitation in the Bankruptcy Act does not apply. It bars only the assignee and those claiming under him. The plaintiff is not in either category. In *Amory v. Lawrence*, 3 Cliff. 523, cited *supra*, the suit was by a bankrupt on a claim existing before the bankruptcy; but the suit was begun long after the two years' limitation had expired. The defendants invoked the statute, but it was held not to apply, — see also *Ludeling v. Chaffe*, 143 U. S. 301.

III. The defendants further contend that the act of the plaintiff in omitting these claims from his schedule was evidently intentional and in fraud of the Bankruptcy Act, and that this fraud vitiates and extinguishes his right to recover them. But in the statement of the case there is no allegation of fraud. The statement of the omission to include the claims in the schedules is not a statement of a fraud. There may have been innocent reasons for it. The court cannot assume that it was fraudulent. Again, the fraud, if any, was against the assignee, the creditors and the Bankruptcy Act, and not against these defendants.

We have not been shown anything in the statement of the case, or in the Bankruptcy Act, which in our opinion inhibits the plaintiff from proceeding with this suit.

Action to stand for trial.

real § 63

CHAPTER VI.
PROVABLE CLAIMS.

SECTION I.
IN GENERAL.

RE BURKA.

DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI,
OCTOBER 24, 1900.

[Reported in 104 Federal Reporter, 326.]

ADAMS, District Judge. This case comes before the court on a petition for review of the action of the referee in allowing a claim contracted by a bankrupt after the filing of the petition for adjudication against him, and prior to the actual adjudication. The claim allowed by the referee was for legal services rendered by Alfred Bettman, an attorney at law, to the bankrupt, in matters unrelated to the bankruptcy proceedings. The question is whether such a claim, not in existence at the time the petition for adjudication was filed, is a provable demand, within the meaning of the bankruptcy act. Section 63 enacts that debts of the bankrupt may be proved and allowed against his estate, which are:

[The court here quoted section 63.]

It is observed that all these classes of provable debts, except the fourth, relate, by express terms of the statute, to such as were in existence at the time of the filing of the petition. The fact that the fourth subdivision contains no words of limitation is considered by claimant's counsel a warrant for his contention that his claim, which is founded on an open account, is provable, notwithstanding the fact that it was not in existence when the petition was filed. It is not apparent why this subdivision is inserted without words of limitation as to the time the claim should have accrued. Especially is this so when there seems to have been a studied effort to insert such words in relation to all the other provable claims. But I cannot construe this omission into a general provision for allowance of demands against the estate of a bankrupt, irrespective of the time when they accrued. If such construction be given to the statute, there would be no limitation even to such claims as existed at the date of the adjudication. The general

language would cover any claims that might accrue during the pendency of the proceedings, even up to the final discharge. In the absence of express provision to the contrary, I think that debts provable under the act must be such as existed at the date of the filing of the petition. That date is one to which many general provisions are referable. For instance, it is enacted in chapter 1, section 1, subdivision 10, that the words "date of bankruptcy," "time of bankruptcy," "commencement of proceedings," or "bankruptcy," when used in the act with reference to time, "shall mean the date when the petition is filed." Moreover, the conclusion reached is in clear analogy with the general rule of procedure in courts charged with the administration of trust estates. According to my observation and experience, the rights of creditors of insolvent estates administered in equity generally relate to the time of the institution of the proceedings which ultimately result in the sequestration of the property which is to be administered.

It is argued by claimant's counsel that because the trustee is vested with the title not only to property which the bankrupt had at the time of the filing of the petition against him, but also to such property as he may have acquired after that, and prior to the date of adjudication, and because all such property goes into the fund for creditors, therefore all creditors having claims which originated at any time prior to the actual adjudication should participate in the fund; in other words, that, as the property which the bankrupt acquires after the filing of the petition enhances the fund for the benefit of creditors, all creditors whose rights accrue at any time before actual adjudication should participate in it. This is a plausible argument, and I presume it would be true that, if the property acquired by the bankrupt after the filing of the petition and before the adjudication did vest in the trustee, creditors whose rights accrued between those dates should share in the property of the bankrupt, like other creditors; but the argument, in my opinion, is based on false premises. Section 70 of the bankruptcy act, which is relied on by claimant's counsel in support of the argument, contains the following provisions.

"The trustee of the estate of a bankrupt upon his appointment and qualification . . . shall be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, . . . to all . . . (5) property which prior to the filing of the petition, he could, by any means, have transferred. . . ."

After a careful consideration of the provisions of this section, I am persuaded that there are two separate subjects treated of: First, the time at which the title to something vests in the trustee; second, the "something" or property the title of which is to vest in the trustee. Inasmuch as the trustee, by the provisions of the act, cannot be chosen or qualified until some time after the date of the filing of the petition, and in fact until some time after the date of adjudication, it is appropriate and fit that some time should be fixed, to which his title to whatever he gets should relate; and such, in my opinion, is the subject-

matter of the first part of the section in question. Properly interpreted, the trustee is by operation of law vested with the title as of the date the bankrupt was adjudged to be a bankrupt. The further provisions of the section, already quoted, undertake to point out the property of which by operation of law he is to become the owner, namely, all property which prior to the filing of the petition the bankrupt could have transferred. In other words, the property which the trustee acquires must have been property or rights which so existed prior to the filing of the petition that the bankrupt might have transferred them. This clearly means the property or rights of property which existed at that time. Such being the true interpretation of section 70, it affords no ground for the argument made by the claimant's counsel. Inasmuch as no property which the bankrupt may have acquired after the filing of the petition and before the date of adjudication is taken by the trustee, there is no ground for the argument that the claimant, holding a claim accrued since the filing of the petition, and before adjudication, should participate in the assets. His claim is neither provable, nor is the bankrupt discharged by the final judgment of the court from the obligation to pay such a claim.

The Supreme Court of the United States, by section 30 of the act, is authorized and empowered to prescribe all necessary rules, forms, and orders as to procedure, and for carrying the bankruptcy act into force and effect. In pursuance of the power conferred upon it, the supreme court adopted form No. 59 (32 C. C. A. lxxxii., 89 Fed. lviii.), which, after preliminary recitations, reads as follows:

"It is therefore ordered by this court that said ——— [namely, the bankrupt] be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the ——— day of ——— A. D. 189—, on which day the petition for adjudication was filed against him."

This form prescribed by the Supreme Court indicates the view which that court takes of the provisions of the act in relation to the discharge of a bankrupt from his debts, and according to it the bankrupt is discharged only from such debts as existed on the day the petition for adjudication was filed against him. It follows that, inasmuch as the bankrupt is not discharged from the debts which are created after the filing of the petition against him, such debts cannot be provable against his estate. In my opinion, the referee reached an erroneous conclusion in this case, and the order will be to disallow or expunge the claim in question.

BARNETT v. KING.

COURT OF APPEAL. NOVEMBER 3, 1890.

[Reported in [1891] 1 Ch. 4.]

APPEAL from STIRLING, J.

This was an action against the executors of the will of Sir Richard Duckworth King, in which the plaintiff claimed £3,000 under a covenant contained in a deed dated the 6th of June, 1885, and £97 7s. 11d. interest thereon from the 2d of November, 1887, the day of the testator's death.

By the deed in question, which was made between the testator of the one part and the plaintiff of the other part, after a recital that the testator had for some years past paid to the plaintiff (who was his brother-in-law) an annuity of £78, and had agreed with the plaintiff, as a further provision, to secure to him the sum of £3,000, to be payable upon the death of the testator in manner thereafter appearing, it was witnessed that, in pursuance of the agreement, and in consideration of the natural love and affection of the testator for the plaintiff, he, the said testator, did thereby covenant with the plaintiff, his executors, administrators, and assigns, that the executors or administrators of him, the said testator, should, within six months from his death, pay to the plaintiff, his executors, administrators, or assigns, the sum of £3,000, with interest for the same at the rate of £5 per cent per annum from the day of the death of the said testator.

In the month of February 1886, the testator filed his petition in bankruptcy; and on the 26th of February, 1886, a receiving order was made thereupon.

The testator did not include his obligation under the deed of covenant in his statement of debts and liabilities, and the plaintiff carried in no proof in respect thereof, although he was aware of the bankruptcy of the testator. . . .

The testator died on the 2d of November, 1887, and the plaintiff brought this action against his executors on the 26th of June, 1888.

One of the defences to the action was that the obligation of the testator, under his covenant in the deed of the 6th of June, 1885, was a debt or liability provable in his bankruptcy, and that any right of action upon the covenant which the plaintiff might otherwise have had was barred by the bankruptcy proceedings.

[On hearing before Mr. Justice STIRLING, the action was dismissed, and the plaintiff appealed.]

Sir JAMES HANNEN. We are of opinion that this appeal fails.

The question seems to resolve itself into whether or not this liability or obligation to pay a sum of money out of the estate of the deceased,

six months after his death, is a liability within the meaning of the 37th section of the Bankruptcy Act of 1883.¹ It is argued that the meaning of the section is, that only such liabilities are capable of proof as relate to the debtor himself; and that liabilities which will only arise after his death are not within the meaning of the section.

I am of opinion that that is too narrow a construction to put upon the words of the Act, and that the true meaning of the section is not merely a liability or obligation, or a possibility of liability or obligation, to pay money on the part of the obligor himself, but that it includes a liability or obligation for the payment of money out of his estate. I think that the observation which was made by Lord Justice FRY in the course of the argument is an exceedingly strong one. Supposing the narrow view to be the correct one, the effect would be, that if the plaintiff, the holder of this deed, had taken the steps proper to be taken in the bankruptcy, he could not have proved in respect of this liability under the Act of 1883. That is plainly, to my mind, an unreasonable conclusion to arrive at. I therefore think that the

¹ 37. (1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable in bankruptcy.

(2) A person having notice of any act of bankruptcy available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice.

(3) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy.

(4) An estimate shall be made by the trustee of the value of any debt or liability provable as aforesaid, which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value.

(5) Any person aggrieved by any estimate made by the trustee as aforesaid may appeal to the court.

(6) If, in the opinion of the court, the value of the debt or liability is incapable of being fairly estimated, the court may make an order to that effect, and thereupon the debt or liability shall, for the purposes of this Act, be deemed to be a debt not provable in bankruptcy.

(7) If, in the opinion of the court, the value of the debt or liability is capable of being fairly estimated, the court may direct the value to be assessed, before the court itself without the intervention of a jury, and may give all necessary directions for this purpose, and the amount of the value when assessed shall be deemed to be a debt provable in bankruptcy.

(8) "Liability" shall for the purposes of this Act include any compensation for work or labor done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring before the discharge of the debtor, and generally it shall include any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of money, or money's worth, whether the payment is, as respects amount fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency, or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or as a matter of opinion.

decision of Mr. Justice STIRLING on the point is correct, and that this appeal must be dismissed with costs.

BOWEN, L. J. I am of the same opinion.

FRY, L. J. I agree.¹

TULLY v. SPARKES.

KING'S BENCH, 1729.

[Reported in 2 Lord Raymond, 1546, and 2 Strange, 867.²]

DEBT upon a bond against the defendant Sparkes and May as executors of William Donelson, setting forth that Donelson entered into a bond in £800 conditioned, that if he, his heirs, executors, or administrators, should pay to the plaintiff £400 within two months after the death of the obligor in case he shall marry Martha Latimer and she shall survive him, then the bond to be void. The plaintiff then avers, that the marriage was had and the wife survived, and the defendants were made executors; but neither they nor the heir have paid the money according to the condition. The defendant May pleads that he never administered or proved the will, and the plaintiff as to him enters a *nolle prosequi*. The other defendant Sparkes prays oyer of the bond, which is set out without the condition; and then pleads, that the obligor was a trader, and after entering into the bond committed an act of bankruptcy, whereupon the creditors petitioned, had a commission, and he was declared a bankrupt, and had his certificate, which was confirmed. To this the plaintiff, having enrolled the condition of the bond in *hæc verba*, demurred; and the defendant joined in demurrer.

The case was argued by Mr. *Strange*, for the plaintiff, and by Mr. *Joceline*, for the defendant.

It was insisted upon by the counsel for the plaintiff, that this bond was not discharged by the act of bankruptcy and certificate within the intention of the acts. Nor is the defendant aided by the act of 7 G. I. c. 31, for explaining and making more effectual the several acts concerning bankrupts; for the £400 in the condition was payable at a day after the bankruptcy committed, viz. within two months after the death

¹ The statement of facts has been abbreviated.

The first statute expressly allowing proof of debts payable in the future was 7 Geo. I. c. 31 (1721), which purported to be enacted to settle a point which had been disputed, though in *Cattowell v. Clutterbuck*, 2 Str. 867, such a debt was held not provable. This statute was, however, held to apply only to such debts if written security was given. *Parlow v. Dearlove*, 4 East, 438. And in 1803, Lord Eldon held that a bond payable after death, not being payable at a day certain, was not provable. *Ex parte Barker*, 9 Ves. 110. 49 Geo. III. c. 121, however, covered all such debts. Even though no express provision were made for such debts in a modern statute, they would doubtless be held provable. *Lowell, Bankruptcy*, 124.

² The case is here reprinted, with some omissions, partly from each of the reports.

of William Donalson the bankrupt, and upon two contingencies, viz. if Martha Latimer married him, and survived him. And a case was cited between Godling and Godling, Pasch. 11 Ann. wherein an action of debt upon a bond dated before the act of bankruptcy committed by the defendant, it appeared the money in the condition was not payable till after the act of bankruptcy; the defendant insisted he ought to be discharged upon common bail by virtue of the statutes about bankrupts, but it was ruled that he should be held to special bail. And the plaintiffs could not come to prove this debt within the 7th G. I. c. 31, because it depends upon two contingencies.

On the other side it was insisted on for the defendants, that this was *debitum in praesenti*, though it was *solvendum in futuro*. Cro. Jac. Neal v. Sheffield, 254, and therefore would be barred by the act of bankruptcy and certificate, &c.

But all the judges were of opinion, that a creditor upon a bond, with condition to pay money at a future day subsequent to the act of bankruptcy, before 7 G. I. c. 31, could not be admitted to prove such debt, or to have any dividend, before such security became payable. And that act recites it to have been a question, for remedy whereof that act was made. And it would be hard upon the former acts, to put such a construction as to bar a man of his debt, when he could not come into the commission, and have the benefit of it. Then as to the statute 7 G. I. c. 31, that enacts that any person who hath given or shall thereafter give credit on such security as aforesaid, [referring to the securities mentioned in the recital] to any person who was or should become a bankrupt, upon a good and valuable consideration bona fide for any sum of money or other matter or thing whatsoever, which should not be due or payable at or before the time of such persons becoming bankrupts, shall be admitted to prove his bond, &c. for the same, in such manner as if it was payable presently, and not at a future day, and shall receive a proportionable dividend, &c., of such bankrupt's estate in proportion to the other creditors of such bankrupt, deducting only thereout a rebate of interest, and discounting such securities payable at future times, after the rate of £5 per cent per annum for what he shall so receive, to be computed from the actual payment thereof, to the time such debt or sum of money should or would have become payable in and by such securities as aforesaid. Then follows a clause that the bankrupt should be discharged of such securities. Now it being uncertain whether this bond should ever become due or not, it depending upon two contingencies which had not both happened at the time of the act of bankruptcy committed, it was impossible to make such abatement of £5 per cent as the act directs; and therefore this bond, the court held, was not within that act; and therefore they were of opinion to give judgment for the plaintiff.¹

¹ This case represented the English law (see Christian on Bankruptcy, I. 287, 2d ed.) until the passage of 6 Geo. IV. c. 16, though in a few cases the court was able to avoid the difficulty by holding that where the debt was secured by a bond with a

RIGGIN v. MAGWIRE.

SUPREME COURT OF THE UNITED STATES, DECEMBER TERM, 1872.

[Reported in 15 Wallace, 549.]

ERROR to the Supreme Court of the State of Missouri.

Magwire sued Rigg in the Circuit Court of St. Louis County, Missouri, to recover damages for a breach of covenant. The defendant pleaded a discharge under the Bankrupt Act of 1841, obtained in

penalty, and the penalty was forfeited by the terms of the bond before the bankruptcy, the debt might be proved, though the sum really recoverable would not have been the full penalty. *Ex parte Winchester* 1 Atk. 116; *Ex parte Marshall*, 1 M. & A. 118. 6 Geo. IV. c. 16, made express provision (sec. 56) for the proof of contingent debts. This section was construed somewhat narrowly, and it was held that "there must not only be a debt or engagement to pay a definite sum, but also that the contingency on which the debt was payable should be one reducible to a matter of calculation, so as to allow a value to be put on the debt for the purpose of proof." *Robson on Bankruptcy* (7th ed.), 272, and see *Atwood v. Partridge*, 4 Bing. 209; *Boorman v. Nash*, 9 B. & C. 145; *Ex parte Tindal*, Mont. & Mac. 415; *Ex parte Grundy*, ib. 293; *Johnson v. Compton*, 4 Sim. 37; *Yallop v. Ebers*, 1 B. & Ad. 700; *Ex parte Davis*, Mont. 121, 297; *Ex parte Marshall*, 1 Mont. & Ayr. 118; *Ex parte Thompson*, Mont. & Bli. 219; *Thompson & Thompson*, 2 Bing. N. C. 168; *Green v. Bicknell*, 8 A. & E. 701; *Field v. Toppin*, 4 Q. B. 386; *Ex parte Whitmore*, 3 De G. & S. 565; *Hinton v. Acraman*, 2 C. B. 367; *Woolley v. Smith*, 3 C. B. 610; *Wallis v. Swinburne*, 1 Ex. 203; *Ex parte Evans*, 3 De G. & S. 561; *South Stafford Ry. Co. v. Burnside*, 5 Ex. 129.

The Act of 1849, 12 & 13 Vict. c. 106, re-enacted (in sec. 177) the provision of the previous act, and added (sec. 178) a further provision allowing valuation and proof of "a liability to pay money upon a contingency which shall not have happened." This was obviously intended to cover the cases which had been held not included under the words contingent debts, but the courts construed the word "liability" narrowly, holding that "the liability must be to pay a sum of money of certain amount, or at all events a sum the amount of which could be ascertained by some settled data; and that the contingency on which the liability depended must not be too remote, but that there must be a single contingency reducible to a matter of calculation, and capable of valuation." *Robson on Bankruptcy* (7th ed.) 275, and see *Amott v. Holden*, 18 Q. B. 593; *Warburg v. Tucker*, 5 E. & B. 384; *Young v. Winter*, 16 C. B. 401; *Maples v. Pepper*, 18 C. B. 177; *Ex parte Todd*, 6 D. M. & G. 744; *Hoare v. White* 3 Jur. n. s. 415; *White v. Corbett*, 1 E. & E. 692; *Boyd v. Robins*, 5 C. B. n. s. 597; *Adkins v. Farrington*, 5 H. & N. 586; *Parker v. Ince*, 4 H. & N. 53; *Mudge v. Rowan*, L. R. 3 Ex. 85; *Betteley v. Stainsby*, L. R. 2 C. P. 568; *Martin's Anchor Co. v. Morton*, L. R. 3 Q. B. 306; *Hastie's Case*, L. R. 7 Eq. 3, 4 Ch. App. 274; *Ex parte Wiseman*, L. R. 7 Ch. App. 35; *Kent v. Thomas*, L. R. 6 Ex. 312. The Act of 24 & 25 Vict. c. 134, made no further direct provision for proof of contingent liabilities than the preceding acts, but it contained a provision (see 153) for the assessment of damages in claims for unliquidated damages growing out of contracts. This was held to include such liabilities only as arose from breach of an express contract before bankruptcy. *Ex parte Mendel*, 1 De G. J. & S. 330; *Sharland v. Spence*, L. R. 2 C. P. 456; *Cary v. Dawson*, L. R. 4 Q. B. 568; *Johnson v. Skafte*, L. R. 4 Q. B. 700.

1 In 1869, however, an adequate statutory provision was made by 32 & 33 Vict. c. 71, sec. 31, which so far as affects contingent liabilities has been repeated in the act of 1883, now in force. Under this provision the only ground for refusing proof of a contingent liability is, that it is impossible fairly to estimate the value of the claim. Under this

June, 1843, but his plea was disallowed, both by the lower court and by the Supreme Court of Missouri on appeal. He, therefore, brought the case here by writ of error.

The case was this:—

On the 2d of December, 1839, Riggin conveyed a certain tract of land near St. Louis to one Ellis, in fee. The operative words of the conveyance were “grant, bargain, sell,” etc., which words in Missouri create a covenant that the grantor has an indefeasible estate in fee. Rev. Stat. 1855, c. 32, § 14; *Magwire v. Riggin*, 44 Mo. 512. The fact was that, prior to the execution of this deed, the property had belonged to one Martin Thomas, whose wife had never relinquished her right to dower in it. But Thomas was then living, and did not die until 1848, several years after the alleged discharge of Riggin as a bankrupt. The property afterwards, by the regular devolution of title, came into possession of Magwire, who sold it in lots to various persons. In 1868 these persons were sued by Mrs. Thomas, widow of Martin Thomas, for the value of her dower, and were obliged to pay it, and the plaintiff was obliged to refund them the amount. He, therefore, brought this suit against Riggin for damages under his implied covenant of indefeasible seisin.

The question was, whether Riggin was discharged from this demand by his decree of discharge in bankruptcy in 1843? Whether he was or not depended on the question whether the claim could have been proved in that proceeding. The 5th section of the Bankrupt Act of 1841, 5 Stat. at Large, 445, declares as follows:—

“All creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurance, sureties, indorsers, bail, or other persons having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts and claims under the act, and shall have a right, when these debts or claims become absolute, to have the same allowed them; and such annuitants and holders of debts payable in future may have the present value thereof

section it has been held that there may be proof of damages from failure of a trustee in bankruptcy to take a lease as the bankrupt had agreed to do: *Ex parte Llynvi Coal Co.*, L. R. 7 Ch. App. 28; so damages for breach of an agreement to furnish steam power, though determinable in a certain contingency: *Ex parte Waters*, L. R. 8 Ch. App. 562; or for failure to pay an annuity: *Ex parte Jackson*, 20 W. R. 1023; or of a surety's right to indemnity or contribution, though contingent on future events: *Ex parte Delmar*, 38 W. R. 752; *Wolmerhausen v. Gullick*, [1893] 2 Ch. 514; *Re Paine*, [1897] 1 Q. B. 122; or of the possible liability of a stockholder for future calls: *Re Mercantile Marine Ins. Co.*, 25 Ch. D. 415; *Re McMahon*, [1900] 1 Ch. 173.

Some rights, however, cannot be valued, and hence not proved: as a covenant not to revoke a will: *Robinson v. Ommaney*, 21 Ch. D. 780; 23 Ch. D. 285; a possibility of having to pay costs to assert a legal right: *Vint v. Hudspeth*, 30 Ch. D. 24; future liability for alimony: *Ex parte Linton*, 15 Q. B. D. 239.

Unless an order is made by the bankruptcy court declaring that the value of a claim cannot fairly be estimated, it will be held to be barred. *Hardy v. Fothergill*, 13 App. Cas. 351.

ascertained under the direction of such court, and allowed them accordingly, as debts *in presenti*."

Messrs. *Glover* and *Shepley*, for the plaintiff in error.

Messrs. *Blair* and *Dick*, *contra*.

Mr. Justice BRADLEY delivered the opinion of the court.

It is argued that under the right given by the fifth section of the Bankrupt Act of 1841 to prove "uncertain and contingent demands," the claim in this case could have been proven under the act. But the better opinion is, that as long as it remained wholly uncertain whether a contract or engagement would ever give rise to an actual duty or liability, and there was no means of removing the uncertainty by calculation, such contract or engagement was not provable under the act of 1841. See 1 Smith's Leading Cases (6th Am. ed.), p. 1137, notes to *Mills v. Auriol*, by Hare. In 1843 Martin Thomas was still living, and there was no certainty that his wife would ever survive him. It was uncertain whether there would ever be any claim or demand. On what principle, then, could the covenant have been liquidated or reduced to present or probable value? If an action at law had been brought on the covenant at that time, nominal damages at most, if any damages at all, could have been recovered. It did not come within the category of annuities and debts payable in future which are absolute existing claims. If it had come within that category, the value of the wife's probability of survivorship after the death of her husband might have been calculated on the principles of life annuities. Had a proposition for a compromise of her right been made between her and the owner of the land, such a mode of estimation would have been very proper. But, without authority from the statute, the assignee would not have been justified in receiving such an estimate and making a dividend on it.

It is unnecessary to review the authorities *pro* and *con* on the subject. They are quite numerous, and mostly cited in the note of Mr. Hare, above referred to. The case is so clear that we have hardly entertained a doubt about it.

*Judgment affirmed.*¹

¹ *Bennett v. Bartlett*, 6 Cush. 225; *French v. Morse*, 2 Gray, 111; *Burruss v. Wilkinson*, 33 Miss. 537, *acc.*; *Stilton v. Pease*, 10 Mo. 473; *Jemison v. Blowers*, 5 Barb. 686, *contra*.

The possible liability of a surety on a bond not defaulted was held not provable under the act of 1841 in *Turner v. Esselman*, 15 Ala. 690; *Woodard v. Herbert*, 24 Me. 358; *Ellis v. Ham*, 28 Me. 335; *Loring v. Kendall*, 1 Gray, 305; *Goodwin v. Stark*, 15 N. H. 218; *Dyer v. Cleveland*, 18 Vt. 241.

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SAYRE v. GLENN.

SUPREME COURT OF ALABAMA, DECEMBER TERM, 1888.

[Reported in 87 Alabama, 631.]

SOMERVILLE, J. The questions arising in this case, except the sufficiency of the defence based on the plea of defendant's bankruptcy, are settled against the appellant in *Lehman, Durr & Co. v. Glenn*, and *Sample v. Glenn*, decided at the present term.

This plea sets up the fact that the defendant, Sayre, on petition filed in the proper District Court of the United States, on the 1st of June, 1870, was duly adjudicated to be a bankrupt, and thereafter — to wit, on April 22, 1871 — received his certificate of discharge, as provided for by the bankrupt law of March 2, 1867.

To this plea a demurrer was sustained; and we think there was no error in this ruling. The ground of demurrer, which seems to us to be fatal to the sufficiency of the plea, is, that the demand in question was one not provable against the estate of the bankrupt, and was not therefore affected by the discharge.

The action is one for the assessment of thirty per cent upon an unpaid subscription to the capital stock of the National Express & Transportation Company. This assessment was ordered to be made by the Chancery Court of the city of Richmond, Va., by decree rendered December 14, 1880. The subscription itself was for the sum of one thousand dollars, payable "in such instalments as may be called for by said company, and to pay one per cent at the time of subscription.

The bankrupt law allowed proof to be made, not only of debts due from the bankrupt at the commencement of the proceedings in bankruptcy, but of "all debts then existing, but not payable until a future day," a rebate of interest being made. U. S. Rev. Stat., § 5067. The law was also made to embrace "contingent debts and liabilities," the right of the creditor to share in dividends being made to depend upon the happening of the contingency before the order of the bankrupt court for a final dividend; or the ability of the court to ascertain and liquidate the "present value" of the debt or liability. U. S. Rev. Stat., § 5068. The phrase "contingent debt" has been construed to mean, not a demand whose existence depended on a contingency, but an existing demand the cause of action upon which depends on a contingency. *French v. Morse*, 68 Mass. 111; *Woodard v. Herbert*, 24 Me. 358.

It is our opinion that a call of this nature made upon an unpaid subscription to corporate stock is not a provable debt within the meaning of the bankrupt law. The precise point was decided by the Court of Appeals of Maryland, in *Glenn v. Howard*, 65 Md. 40 (1885), where the question is fully discussed. It was suggested that there was no right of action on the subscription until a call was made, either by the

governing officers of the corporation, or by order of the Chancery Court having jurisdiction to make such an assessment. It might be that such call might never be made in any event; and if so, there would never exist any liability to pay anything on it. It was said not to be a debt in *presenti*, payable in *futuro*. The demand, we may add, would thus be one whose existence would depend upon a contingency rather than one that existed already, with a right of action on it depending on such contingency. It was accordingly held, that where a call was made on a subscription of stock identical with that here in controversy, after the discharge of the subscriber in bankruptcy, it would not be affected by the provisions of the bankrupt law, because the demand was one not provable under the law against the bankrupt's estate. A ruling of the same kind was made in *South Staffordshire R. Co. v. Burnside*, 5 Exch. 129, which has generally been since followed by the English courts. See also *Glenn v. Clabaugh*, 65 Md. 65; and *Riggin v. Magwire*, 15 Wall. 549; *Steele v. Graves*, 68 Ala. 21.

The assignee of the bankrupt was not bound to accept the stock in this corporation as a portion of the bankrupt's assigned property, as it was of an onerous and unprofitable character, and it does not appear that he ever did so. The bankrupt proceedings do not therefore affect the question of the stockholder's liability. *File Co. v. Garrett*, 110 U. S. 288; *Rugeley v. Robinson*, 19 Ala. 404; *Glenn v. Howard*, *supra*.

The demurrer to the plea of bankruptcy was properly sustained.

The other assignments of error are without merit, and the judgment is affirmed.¹

¹ *Glenn v. Howard*, 65 Md. 40, *acc.*; *Irons v. Bank*, 17 Fed. Rep. 308; *Glenn v. Abell*, 39 Fed. Rep. 10; *Carey v. Mayer*, 79 Fed. Rep. 926, *contra*.

In all these cases the corporation had suspended payment or made a general assignment before the date of the bankruptcy. In the case last cited the court said: "The decision of this case is placed upon the ground that the deed of the corporation of all its assets to trustees for the benefit of creditors, being a declaration by the corporation of its insolvency and also the commencement of the winding up, preceded the filing of the defendant's petition in bankruptcy, and that, by reason of these facts, the defendant's obligation as a stockholder became a liability with a contingency, viz., the ascertainment by a Court of Chancery of the amount to be paid; that this amount could have been made certain; and that it was the duty of the trustees to endeavor to make it certain before the order for a final dividend."

Under the law of 1867 it was held that the liability of the surety of a bond was provable though the liability of the principal had not been fixed. *United States v. Throckmorton*, 8 B. R. 309; *Jones v. Knox*, 46 Ala. 53; *Fisher v. Tift*, 127 Mass. 313 (see also *McDermott v. Hall*, 177 Mass. 224); *Fisher v. Tift*, 12 R. I. 56.

But see *contra*, *United States v. Rob Roy*, 13 B. R. 235; *Steele v. Graves*, 68 Ala. 21 (overruling *Jones v. Knox*, 46 Ala. 53).

The liability of the principal in a replevin or attachment bond was held provable in *Wolf v. Stix*, 99 U. S. 1, and *Hill v. Harding*, 130 U. S. 699, though the question had not been decided at the time of bankruptcy whether there would be any liability on the bond.

An annuity was held provable in *Haywood v. Shreeve*, 44 N. J. L. 94.

A breach of warranty where the right of action arose before bankruptcy. *Williams v. Harkins*, 15 B. R. 34; *Merrill v. Schwartz*, 68 Me. 514.

MOCH v. MARKET STREET NATIONAL BANK.

CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, APRIL 22, 1900.

[Reported in 107 Federal Reporter, 897.]

BEFORE ACHESON, DALLAS, and GRAY, Circuit Judges.

ACHESON, Circuit Judge. The question presented by this appeal is whether the liability of a bankrupt indorser of commercial paper, whose liability did not become absolute until after the filing of the petition in bankruptcy, may be proved against his estate after such liability has become fixed, and within the time limited for proving claims. By the first section of the bankrupt law, — the Act of July 1, 1898, — it is declared that the word "debt," as used in the Act, shall include "any debt, demand, or claim provable in bankruptcy." Section 63 declares what debts of the bankrupt may be proved and allowed against his estate, and ranges the provable debts in five subdivisions, numbered from 1 to 5, inclusive. For present purposes we need quote only two of those subdivisions, namely: —

"(1) A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with a rebate of interest upon such as were not then payable and did not bear interest;"
"(4) founded upon an open account, or upon a contract express or implied."

Clearly the liability of an indorser is within the very words of this fourth subdivision. As was said by the Supreme Court in *Martin v. Cole*, 104 U. S. 30, 37, 26 L. Ed. 647, the contract created by the indorsement of commercial paper is an "express contract," and "its terms are certain, fixed, and definite." The indorser's engagement is to pay a sum certain at a fixed date, to wit, the amount of the bill or note at its maturity, if it is not paid upon due presentment by the party primarily liable, upon due notice of its dishonor being given to the indorser. If it can be affirmed that such an unmatured liability is not a "debt" in a technical sense, certainly it is a "demand" or "claim," and comes, it seems to us, within the scope of the fourth subdivision of section 63 of the Act. The primary purpose of the bankrupt act was to relieve insolvent debtors from their pecuniary liabilities, and to secure ratable distribution of their estates among their creditors. It is not, then, to be lightly believed that Congress intended to exclude from the operation and benefits of the Act unmatured indorsements of commercial paper, which in every commercial community so often constitute a large proportion of the indebtedness of failing debtors. Of course, if not provable, such liabilities are not discharged. Now, a construction leading to results so foreign to the

general purpose of the law is not to be adopted unless plainly required by the language of the Act. We cannot see that such an interpretation is demanded by anything contained in the Act. The first and fourth subdivisions of section 63 are distinct provisions, and are, we think, independent of each other. We are unable to agree to the proposition that subdivision 1 qualifies, and is to be carried down and read into, subdivision 4. On the face of the Act they are distinct. Moreover, reasonable effect can be given to both by treating them as separate and independent clauses. There are well-known instruments—for example, surety bonds—under which the liability is contingent on future defaults, and where the amount of liability is wholly uncertain, depending on the nature of the default. To instruments of this character, where the liability is remote and is uncertain in amount and otherwise, subdivision 1 is fairly referable; but we think, with the court below, that the contract created by the indorsement of commercial paper is not governed by that subdivision, but falls within subdivision 4, which embraces debts, claims, or demands founded upon contracts, express or implied. Accordingly the order of the District Court allowing the claim of the Market Street National Bank against the estate of the bankrupt, Joel J. Gerson, is affirmed.¹

IN RE BINGHAM.

DISTRICT COURT FOR THE DISTRICT OF VERMONT, MAY 30, 1899.

[Reported in 94 Federal Reporter, 796.]

WHEELER, District Judge. At the time of the filing of the petition the bankrupt owed James E. Hartshorn \$100.50, Hartshorn owed the bankrupt \$554.70, and both were holden on a note of \$1,200 to a savings bank, one-half of which each ought to pay. The bank has proved its claim, and Hartshorn has taken up the note. One-half of what he paid was his own debt, and he can have no claim against the bankrupt estate growing out of that. He insists that the balance of direct claims between him and the bankrupt should be set off against what he has paid that the bankrupt ought to have paid, and that balance should stand as a valid claim in his favor against the estate. The bankrupt was impliedly bound to save him harmless from this part of that debt, and has not done so; but the detriment has occurred since the filing of the petition, and, till that

¹ *Re Gerson*, 105 Fed. Rep. 891, *acc.*

Re Schaefer, 104 Fed. Rep. 973, *contra.*

A penal bond to secure the payment of an annuity was held provable as an instrument creating a fixed liability for the amount of the penalty, since the value of the annuity computed on life tables exceeded the penalty in *Cobb v. Overman*, 109 Fed. Rep. 65 (C. C. A.).

occurrence. Hartshorn had no provable claim on that account. By this bankrupt act all claims turn upon their status at the time of the filing of the petition, and decisions upon statutes having different provisions in this respect will not afford safe guides for the construction of this. It affords relief for a surety when the creditor does not prove the claim by allowing the surety to prove it for subrogation, but nothing more. The relief is the same that the surety would have if the creditor should prove the claim, and get what could be had upon it voluntarily. The creditor has no right to anything more than payment, and the surety who has borne the burden is entitled to the benefit. These rights arise, not from the original contract of suretyship, but from the equities of the subsequent transactions. *Miller v. Sawyer*, 80 Vt. 412. Subrogation of the surety to the rights of the creditor does not enlarge them. They extend only to such dividends as the creditor can have. Here, Hartshorn should pay the balance due between him and the bankrupt to the trustee, now, for administration; and the trustee should pay the dividends on the bankrupt's half of the note, when declared, to Hartshorn. One-half of bank claim to stand for benefit of Hartshorn. Hartshorn's claim merged in balance of \$444.20 due the estate.¹

MACE v. WELLS.

SUPREME COURT OF THE UNITED STATES, JANUARY TERM, 1849.

[Reported in 7 Howard, 272.]

MR. JUSTICE McLEAN delivered the opinion of the court.

This case is brought before the court by a writ of error to the Supreme Court of the State of Vermont, under the twenty-fifth section of the Judiciary Act of 1787.

Wells, as the surety of Mace, became bound in two joint and several notes, both of which were due before the passage of the bankrupt law, in August, 1841. In July, 1841, Wells paid one of these notes. Mace was discharged, under the bankrupt law, on the 22d of March, 1843. In March, 1844, Wells paid the other note, and then sued Mace for the recovery of the money on both notes. The facts being submitted

¹ In *Re Schmechel Cloak & Suit Co.*, 104 Fed. Rep. 64, the court held that a surety who by paying the creditor had become entitled under Sec. 57 i. of the Bankrupt Act to be subrogated to the auditor's claim, had no greater rights than the creditor, and must therefore surrender any preference the creditor had received, as a condition of proof.

In *Re Heyman*, 95 Fed. Rep. 800, the court held that where a surety had partly paid the creditor, the right to prove the whole claim against the principal debtor still remained in the creditor.

to the county court, judgment was entered for the plaintiff for the amount of the note last paid; which judgment was affirmed by the Supreme Court of the State.

The fourth section of the bankrupt law provides that a "discharge and certificate, when duly granted, shall in all courts of justice be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt which are provable under this act," &c.

By the fifth section of the act, it is provided that "all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurance, sureties, indorsers, bail, or other persons having uncertain or contingent demands against such bankrupt, shall be permitted to come in and prove such debts or claims under this act, and shall have a right, when their debts and claims become absolute, to have the same allowed them," &c.

Wells, as surety, was within this section, and might have proved his demand against the bankrupt. He had not paid the last note, but he was liable to pay it, as surety, and that gave him a right to prove the claim under the fifth section. And the fourth section declares, that from all such demands the bankrupt shall be discharged. This is the whole case. It seems to be clear of doubt. The judgment of the State court is reversed.¹

¹ In accord under the Act of 1841 are, *Kyle v. Bostick*, 10 Ala. 589; *Dean v. Speakman*, 7 Blackf. 317; *Frentress v. Markle*, 2 Greene (Ia.), 553; *Morse v. Hovey*, 1 Sandf. Ch. 187; *Stark v. Stinson*, 23 N. H. 259; *Tubbs v. Williams*, 9 Ired. 1; *Fulwood v. Bushfield*, 14 Pa. 90; *Stone v. Miller*, 16 Pa. 450; *Clarke v. Porter*, 25 Pa. 141; *Hardy v. Carter*, 8 Humph. 153.

Contra are *Payne v. Joyner*, 6 Ark. 241; *Dunn v. Sparks*, 1 Ind. 397; *Dole v. Warren*, 32 Me. 94; *McMullin v. Bank of Penn. Township*, 2 Pa. St. 343; *Cake v. Lewis*, 8 Pa. 493; *Goss v. Gibson*, 8 Humph. 197; *Kerr v. Clark*, 11 Humph. 77; *Wells v. Mace*, 17 Vt. 503; *Swain v. Barber*, 29 Vt. 292.

In accord under the Act of 1867 are, *Liebke v. Thomas*, 116 U. S. 605; *Re Perkins*, 10 B. R. 529; *Lipscomb v. Grace*, 26 Ark. 231; *Hays v. Ford*, 55 Ind. 52; *Post v. Losey*, 111 Ind. 74; *Noland v. Wayne*, 31 La. Ann. 401; *Hunt v. Taylor*, 108 Mass. 508; *Fisher v. Tift*, 127 Mass. 313; *Fairbanks v. Lambert*, 137 Mass. 373; *Miller v. Gillespie*, 59 Mo. 220; *Crofts v. Mott*, 4 N. Y. 603; *Tobias v. Rogers*, 13 N. Y. 59; *Fisher v. Tift*, 12 R. I. 56; *Eberhardt v. Wood*, 2 Tenn. Ch. 488; *Cocke v. Hoffman*, 5 Lea, 105, 109; *Smith v. Hodson*, 50 Wis. 279, 284. See also *Fernald v. Clark*, 84 Me. 234; *McDermott v. Hall*, 177 Mass. 224, 225.

Contra are, *Byers v. Alcorn*, 6 Ill. App. 39; *Dole v. Warren*, 32 Me. 94; *Liddell v. Wiswell*, 59 Vt. 365.

See further on the subject of this note, *Ames Cas. Suretyship*, 515-518, 557-559.

THAYER v. DANIELS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER TERM, 1872.

[Reported in 110 Massachusetts, 345.]

CONTRACT. The declaration alleged that the defendant as principal, and the plaintiff as surety, signed a note for \$500, dated September 28, 1861, and payable on demand to Nathan George or order, with interest; that the plaintiff signed as surety without consideration, and for the accommodation of the defendant; that the defendant failed to pay the note; and that the plaintiff had to pay to George the principal of the note to take it up. The answer denied the allegations of the declaration, and also set up the statute of limitations, and a discharge of the defendant in insolvency.

At the trial in the Superior Court, before BACON, J., it appeared that the plaintiff executed the note without any consideration, and for the accommodation of the defendant; that the defendant on February 11, 1862, filed his petition for the benefit of the insolvent law; that a warrant was duly issued; that at the third meeting of the creditors George proved the note against the defendant's estate; that a small dividend was then declared; that afterwards, in August, 1862, the defendant was duly discharged from his debts; and that on May 1, 1865, the plaintiff paid to George on the note \$500, which was less than the amount then due upon it, and took it up. The defendant asked the judge to rule that the statute of limitations began to run against the plaintiff's cause of action from the time the note fell due; and that the discharge in bankruptcy was a bar to the action; but the judge refused so to rule, and ruled that on the foregoing facts the plaintiff was entitled to recover. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

P. E. Aldrich (*S. A. Burgess* with him), for the defendant.

T. G. Kent, for the plaintiff.

AMES, J. There was an implied promise, on the part of the defendant, as principal, to indemnify the surety, and to repay to him all the money that he might be compelled, in consequence of his liability as surety, to pay to the creditor. Until the surety has been compelled to make such payment, there is no breach of this implied promise. The cause of action accrues then for the first time, and the statute of limitations then begins to run. Of course the exception that the claim of the plaintiff is barred by that statute cannot be maintained. *Appleton v. Bascom*, 3 Met. 169; *Hall v. Thayer*, 12 Met. 180.

At the time when the defendant petitioned for the benefit of the insolvent law, the plaintiff's cause of action against him had not accrued. Nothing was due at that time from the insolvent to the plaintiff, and whether anything would become due depended upon the contingency of his being compelled to pay, and actually paying, the note, in whole or

in part. If the plaintiff had taken up the note, or made a payment upon it, at any time before the making of the first dividend, his claim for the money so paid would have been provable against the estate of the insolvent, under the Gen. Sts. c. 118, § 25, and would therefore have been barred by the discharge. But it appears from the report that no money was paid by the plaintiff as surety, and no cause of action accrued to him against the insolvent, until long after the first and only dividend was paid from his estate.

The case of *Mace v. Wells*, 7 How. 272, which is relied upon by the defendant, arose under the bankrupt act of 1841, a statute which differed from our insolvent law, in allowing sureties and other parties under a contingent liability to prove such contingent liabilities as claims upon the estate, and "when their debts and claims become absolute," to have them allowed.

The defendants also insist that the debt itself was provable and was therefore discharged; but this is not true as to the contingent claim of the surety. He had no claim that was provable under the statute, at the date of the discharge.

Two other cases relied upon by the defendant, *Wood v. Dodgson*, 2 M. & S. 195, and *Vansandau v. Corsbie*, 8 Taunt. 550, were decided under English statutes which in express terms make the contingent liability of a surety a provable claim against the bankrupt's estate. In the first of these cases the court say that the statute was intended to benefit the sureties, by allowing them to share in the dividend before the estate is all gone, and before the actual payment of their liabilities. Neither of these decisions is applicable to a case under our insolvent laws.

*Exceptions overruled.*¹

¹ "Under the English Bankrupt Act of the last century only debts due at time of the act of bankruptcy were provable. A surety who had not paid the creditor at that time had, therefore, no provable claim against the principal, and hence the bankrupt's certificate did not bar the surety's right to recover reimbursement from principal for any money paid by surety to creditor after the act of bankruptcy. *Chilton v. Whiffin*, 3 Wils. 13; *Goddard v. Vanderheyden*, 3 Wils. 262, 2 Bl. 794, s. c.; *Young v. Hockley*, 3 Wils. 346; *Vanderheyden v. De Paiba*, 3 Wils. 528; *Heskynson v. Woodbridge*, 1 Doug. 166, n. (55); *Taylor v. Mills*, Cowp. 525; *Alsop v. Price*, 1 Doug. 160; *Paul v. Jones*, 1 T. R. 599; *Ex parte Lloyd*, 1 Rose, 4; *Wright v. Hunter*, 1 East, 20. Under Bankrupt Act, 49 Geo. III. c. 121, a surety had the right to prove directly or indirectly for any debt of the bankrupt to the creditor which was in existence at the time of commission issued. If the creditor's claim was not a debt when the principal became bankrupt, the surety had no provable claim against the principal, and therefore might, on subsequently paying the creditor, recover from the bankrupt even after his discharge. *Page v. Russell*, 2 M. & Sel. 551; *Welsh v. Welsh*, 4 M. & Sel. 333; *Hewes v. Mott*, 6 Taunt. 319; *M'Dongal v. Paton*, 8 Taunt. 584; *Taylor v. Young*, 3 B. & Al. 521; *Newington v. Keeys*, 4 B. & Al. 493; *Watkins v. Flannagan*, 1 Gl. & J. 199; *Watkins v. Flannagan*, 1 Bing. 413 (affirming s. c. 3 B. & Al. 186); *Freeman v. Burgess*, 6 L. J. C. P. 34." Ames, *Cas. Suretyship*, 518, n. 3. Under the present English statute, Robson (7th ed. p. 306) says: "The whole of the sum for which the surety is liable must be discharged, either by payment in full or of part in satisfaction of the whole, before the surety can claim to stand in the creditor's place, or to prove," and criticises *Ex parte Delmar*, 38 W. R. 752, where the surety was allowed to prove before payment.

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COLUMBIA FALLS BRICK COMPANY v. GLIDDEN.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY 25—
SEPTEMBER 29, 1892.

[Reported in 157 Massachusetts, 175.]

CONTRACT, on a promissory note. The writ was dated October 18, 1890. The declaration was as follows:—

“And the plaintiff says the defendants, then doing business as co-partners under the firm name of Hobbs, Glidden, & Co., made and delivered to the plaintiff their promissory note, a copy of which with the indorsements thereon is hereto annexed; that thereafter, and before the maturity of said note, the plaintiff indorsed the same and negotiated it for value; that at the maturity of said note the same was duly presented for payment at the Howard National Bank, but was not paid, whereof the plaintiff had due notice, that thereafter, to wit, on the twenty-fifth day of April, 1890, the plaintiff was compelled to pay, and did in fact pay, to the Third National Bank of Boston, the holder of said note, on account of the amount due thereon from the defendants, the sum of \$3,646, $\frac{1}{10}$ ¢, and that no part of the same has been paid to the plaintiff. Wherefore the defendants are justly indebted to the plaintiff therefor in the sum of \$3,646 $\frac{1}{10}$ ¢, with interest from April 25, 1890.”

The note was for \$6,000, dated Boston, November 23, 1889, and payable four months after date to the order of the plaintiff. At the trial in the Superior Court, without a jury, before MASON, C. J., there was evidence tending to show that the defendants gave the note for a good consideration to the plaintiff corporation, which immediately thereafter indorsed it for value to the Third National Bank of Boston; that on February 4, 1890, the defendants filed their voluntary petition in insolvency, and on February 8, 1890, a proposal of composition under the St. of 1884, c. 236, which, after due notice to the creditors, was confirmed by the Court of Insolvency for the county of Middlesex on March 13, 1890; that the bank proved its claim as holder of the note on March 13, 1890, and received a dividend, according to the terms of proposal on April 17, 1890, of \$2,382.40, which was indorsed on the note; and that at the maturity of the note it was duly protested, notice being to the plaintiff, and the plaintiff paid the balance due thereon of \$3,646.46 on April 25, 1890, and the defendants received their discharge in insolvency on April 14, 1890.

The plaintiff was a corporation under the laws of the State of Maine, having its principal office therein, and having besides a place of business in Boston. It had, before the date of the writ, filed with the Commissioner for Corporations of this Commonwealth the power of attorney required by the St. of 1884, c. 330, § 1.

The judge ruled that the action could not be maintained, and found for the defendants; and the plaintiff alleged exceptions.

F. T. Benner, for the plaintiff.

S. L. Whipple, for the defendants.

LATHROP, J. The contract which the defendants made in this case was to pay the note to the person who might be its legal holder at the time of its maturity. From this contract they have been released by their discharge in insolvency, the note having been proved against their estate by its then holder. Pub. Sts. c. 155, § 28; St. 1884, c. 236, § 5, as amended by St. 1885, c. 353, § 1, and by St. 1889, c. 406, § 1. The fact that after the maturity of the note the payee was obliged to pay to its indorsee the balance due on the note after deducting the dividend received from the estate of the defendants, did not create a new debt against the defendants, but was merely a transfer of the old debt. The promise of the defendants was one indivisible promise. See *Hunt v. Taylor*, 108 Mass. 508; *Cowley v. Dunlop*, 7 T. R. 565; *Buckler v. Buttivant*, 3 East, 72; *Houle v. Baxter*, 3 East, 177.

The case differs widely from *Thayer v. Daniels*, 110 Mass. 345, where a surety under like circumstances to those in the case at bar was allowed to maintain an action against the maker of a promissory note. The undertaking of the maker to the surety is one of indemnity against any loss or damage which he may suffer in consequence of the failure of the maker to pay the note. It is an implied, and not an express contract. The contract of the maker, on the other hand, with the payee or indorser, is an express contract, from which in this case the makers have been released by their discharge in insolvency.

The plaintiff further contends, that, being a foreign corporation, its claim is not barred by the defendants' discharge. *Kelley v. Drury*, 9 Allen, 27; *Phoenix National Bank v. Batcheller*, 151 Mass. 589. But as the plaintiff's right of action grows out of the note, and as this has been proved against the defendants' estate in insolvency, these cases do not apply.

Exceptions overruled.

GODING v. ROSCENTHAL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER 18, 1901.

[Reported in 61 *Northeastern Reporter*, 222.]

BARKER, J. By the execution of the bond of March 29, 1898, to August, in which the present plaintiff was a surety for the present defendant, the latter incurred an obligation to the present plaintiff to reimburse him any amount which he might be compelled as surety to pay upon the bond. This obligation was in force when, on February 13, 1900, the present defendant's petition in bankruptcy was filed. It

was an obligation founded upon an implied contract, and it was evidenced by an instrument in writing, and in one sense it was a fixed liability. But no debt was absolutely owing at the time of the petition. The obligation was contingent upon the happening of a breach of the bond and a payment by the surety. The payment by the surety was not until June 12, 1900, and there seems to have been no breach of the bond before that date. Therefore neither the obligee in the bond nor the surety could prove in the bankruptcy proceedings a claim founded upon the bond, unless merely contingent claims are provable under the bankruptcy act of 1898. The ultimate decision of that question is yet to be made by the Supreme Court of the United States. But in Morgan v. Wordell, 178 Mass. 350, 59 N.E. 1037, this court assumed that such claims were not provable under the act, and we follow that view in the present case.

Exceptions sustained.

IN RE ORIENTAL COMMERCIAL BANK.
EX PARTE EUROPEAN BANK.

IN CHANCERY, NOVEMBER 24, 1871.

[Reported in Law Reports, 7 Chancery Appeals, 99.]

THIS was an appeal from a decision of Vice-Chancellor BACON, made in the winding-up of the Oriental Commercial Bank, Limited, L. R. 12 Eq. 501. The facts were shortly as follows:—

On the 12th of March, 1866, Mr. D. Pappa, the manager of the Oriental Commercial Bank, wrote to the manager of the European Bank as follows:—

“We beg to advise you that our Galatz correspondent, Mr. E. Constantinidi, has valued upon your establishment for our account in the sum of £15,250, as per particulars at foot, which drafts please honor on presentation for our account, on the usual understanding that we furnish you with funds to meet the same at maturity.”

In consequence of this undertaking, Mr. Constantinidi drew bills to the amount of £8,800, which were accepted by the European Bank, and handed to the Oriental Commercial Bank as agents of the drawer, and indorsed by them to the Agra Bank, who discounted them.

When the bills became due all the three banks had stopped payment, and were in process of liquidation; and as no funds had been provided to the European, the bills were dishonored.

The Agra Bank, the holders of the bills, proved against the European Bank for £8,804 1s. 6d., and received a first dividend of 3s. 4d. in the pound, amounting to £1,467 6s. 11d. They then proved against Oriental Commercial Bank, as the indorsers, for the balance of £7,336 14s. 7d., and received from their estate a dividend of 13s. in the pound. They subsequently received a further dividend of 6s. 8d. in the pound

from the European Bank on their original proof. The result was that they recovered the full amount of their debt: half being paid by the European, and half by the Oriental Commercial Bank.

The Oriental Commercial Bank afterwards paid the European Bank 13s. in the pound on the sum of £1,467 6s. 11d., and 2s. in the pound on the whole amount of the bills; so that they altogether paid 15s. in the pound on the whole amount of the bills, which was the amount of dividend paid to their other creditors.

The liquidators of the European Bank afterwards sought to be admitted creditors against the estate of the Oriental Commercial Bank for the sum of £4,402 0s. 9d., which they had been compelled to pay through the breach of the undertaking to provide them with funds to meet the bills at maturity. The Vice-Chancellor admitted the proof, and the liquidators of the Oriental Commercial Bank appealed from this decision.

Mr. *De Gex*, Q. C., Mr. *Kay*, Q. C., and Mr. *Jackson*, for the appellants.

Mr. *Eddis*, Q. C., and Mr. *Graham Hastings*, for the European Bank.

Sir G. MELLISH, L. J., after shortly stating the facts of the case, continued:—

It is quite obvious that if this proof is allowed the Oriental Commercial Bank will pay a double dividend on the same debt. It appears to me clearly that it is substantially the same debt: because if all parties had been solvent, whatever sums the Oriental Commercial Bank might have paid to the Agra Bank, although they would have paid it, no doubt, for the purpose of performing the contract they had entered into by their indorsement, yet, substantially, whatever sums they might have paid to the Agra Bank would have gone in reduction of the sum which the Oriental Commercial Bank had promised to pay to the European Bank. In that case the Oriental Commercial Bank could never have been called upon to pay these bills twice over. It would have made no difference that they had entered into two contracts with two separate parties that they would pay the bills—namely, with the European Bank as acceptors, and with the Agra Bank as holders. It is clear that they would have performed both contracts by paying the bills once, because they had guaranteed the acceptors; and, in fact, the acceptance having been an acceptance for their use, their payment to the Agra Bank would, in substance and in point of law, have been a payment by the acceptors.

Then the question is, whether, the parties being insolvent, the Oriental Commercial Bank can be liable to pay two dividends on the same debt? It has been the law for a great number of years with reference to proofs in bankruptcy, that if an acceptor accepts bills for the accommodation of the drawer, and the drawer enters into a contract, either express or implied (and I do not think there is any difference between the two), that he will provide for the bills when they become

due, and then the drawer becomes bankrupt, there cannot be a double proof against his estate, namely, one proof by the holder of the bill, and the other proof by the acceptor of the bill on the contract of indemnity. Then the real question before us is this: Does it make any distinction that the Oriental Commercial Bank were not drawers, but entered into the contract with the acceptors, and afterwards became liable for the bills as indorsers? It appears to me that that ought not to make any distinction, although I do not find any precise decision upon the point. The case of Rigby v. Macnamara, 2 Cox, 415, tends to show that this rule against double proof applies in the Court of Chancery as well as in the Court of Bankruptcy, and therefore would apply equally where companies are being wound up. It seems to me that the principle is a perfectly sound one. Authorities have been cited to show that there cannot be double proof against joint and separate estates. That is really carrying the same principle still further, for in that case the proof is not twice against the same estate, but against different estates though belonging to the same person. As to that application of the principle, some judges have said that it should not be carried any further. But the principle itself,—that an insolvent estate, whether wound up in Chancery or in Bankruptcy, ought not to pay two dividends in respect of the same debt — appears to me to be a perfectly sound principle. If it were not so, a creditor could always manage, by getting his debtor to enter into several distinct contracts with different people for the same debt, to obtain higher dividends than the other creditors, and perhaps get his debt paid in full. I apprehend that is what the law does not allow; the true principal is, that there is only to be one dividend in respect of what is in substance the same debt, although there may be two separate contracts. Therefore, upon the whole, with great respect to the Vice-Chancellor, I am of opinion that this proof should not be allowed.

Sir W. M. JAMES, L. J. I entirely concur.¹

EX PARTE NEWTON. IN RE BUNYARD.

COURT OF APPEAL, JUNE 24–DECEMBER 9, 1880.

[Reported in 16 Chancery Division, 330.]

COTTON, L. J. I have now to deliver the judgment of Lord Justice BAGGALLAY and myself, in which I believe the late Lord Justice THESIGER would have agreed.

Each of these appeals raised the same question, namely, whether the

¹ Other illustrations of the rule against double proof may be found in *Ex parte Macredie*, 8 Ch. App. 535; *Ex parte Mann*, 5 Ch. D. 367; *Ex parte Murrell*, 38 L. T. N. S. 363.

holder of a bill of exchange taken from the drawer as security for a sum less than the amount of the bill is entitled, as against the estate of the bankrupt, who had accepted it for the accommodation of the drawer, to prove only for the amount due to him (the holder) or for the amount of the bill, with a restriction that he shall not receive dividends on his proof to an amount exceeding the sum due to him on his security. It was conceded that, if the bill had been accepted for value, the holder would have been entitled to prove for the larger amount. But it was urged on behalf of the respondent that the fact of the acceptance being for the accommodation of the drawer makes a difference. It was said, and truly, that a man who has taken a bill from the drawer as security only will hold for the drawer any sum recovered from the acceptor beyond the amount due on his security, and that when the bill has been accepted for the accommodation of the drawer, he, the drawer, would be liable to repay to the acceptor any part of the sum recovered from him, which may be handed to the drawer by the holder of the bill. But the acceptor has put it in the power of the drawer to make the bill in the hands of a holder for value available against the acceptor for its full amount, and, although the holder may have taken it as security for a sum less than the amount of the bill, we are of opinion that such a holder is entitled to make the bill available against the acceptor in the way which will best produce the sum due to him, and that, in the event of bankruptcy, he is entitled to prove against the acceptor's estate for the full amount of the bill. It was argued that, if the acceptor had not become bankrupt, judgment in an action against him on the bill would be confined to the amount due on the security thereof from the drawer. But, if the acceptor is solvent, a judgment against him will realize the full amount for which it is obtained, and, even if he is not solvent, the amount to be recovered on the judgment will (to an amount not exceeding the sum for which the judgment is recovered) be limited only by the value of his estate which can be realized under the judgment. In case this is insufficient to pay the debt to the holder of the bill, the amount which he will recover will not be increased by giving him judgment for a larger sum. It was, however, contended that there is authority in favor of the respondent, and *Ex parte Bloxham*, 5 Ves. 448, was referred to. The decision of Lord Rosslyn there reported is in favor of the more limited proof. But the order was afterwards (6 Ves. 600) discharged, and an order made giving the bill-holder a right to prove for the full amount of the bill. This case, even if it is not (as we think it is) an authority in favor of the appellants, cannot be regarded as an authority against them. We are of opinion, therefore, that the appellants are entitled to prove for the full amount of the bills, with a restriction that they are not to receive dividends beyond the amounts due to them.¹

¹ *Ex parte Kelty*, 1 Low. 394; *Bailey v. Nichols*, 2 B. R. 478, *acc.*

IN RE SOUTHER. EX PARTE TALCOTT.

DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS,
MARCH, 1874.

[Reported in 2 Lowell, 320.]

THIS was a question upon evidence certified by the register, concerning the debt offered for proof by Frederic Talcott, and called for a decision whether the amount paid by an indorser of a note, after the bankruptcy of the maker, and after an affidavit in due form had been made by Talcott for proving the debt, but before the first meeting of the creditors, and therefore before the debt could be admitted to proof, should be deducted from the debt as a payment *pro tanto*. The case was not argued.

LOWELL, J. The general rule undoubtedly is, that the holder of a note may prove against all the parties for the full amount, and receive dividends from all until he has obtained the whole of his debt with interest. It is likewise the general rule, that what he has received from one party, or from dividends in bankruptcy of one party, to the note, are payments which he must give credit for if he afterwards proves against others. *Sohier v. Loring*, 6 Cush. 537; *Ex parte Wildman*, 1 Atk. 109; *Ex parte The Royal Bank of Scotland*, 2 Rose, 197; *Ex parte Taylor*, 1 DeGex & J. 302. I am of opinion that this latter rule must be confined to cases in which the payment has been made by the person primarily liable on the note or bill. The two cases last above cited cover the whole ground of this inquiry. In the former, it was held that such credit must be given for dividends received after a claim had been made in bankruptcy, but before the debt was actually and formally proved; and in the latter, that when such payments had been made by the drawer of a bill of exchange, and the proof was offered against the acceptor, still the credits must be given. One of the learned justices, however, in giving judgment, reserved his opinion whether the rule would apply if the holder offered his proof as a trustee for the drawer, or for the estate of the drawer. The theory of this decision is, that no creditor can prove for more than his actual debt, as it exists at the time of proof, without obtaining an undue advantage over other creditors. The answer attempted to be maintained by the creditor in that case, was, that a holder may sue for the whole debt at law against the party primarily liable, and hold the money for whom it may concern. For this position he cited *Jones v. Broadhurst*, 9 C. B. 173, then recently decided. The court of appeal in bankruptcy expressed doubts whether *Jones v. Broadhurst* stated the true rule at law,¹ and

¹ "There is no foundation for this doubt. The cases uniformly support the doctrine of *Jones v. Broadhurst*, *Randall v. Moore*, 12 C. B. 261; *Williams v. James*, 19 L. J. Q. B. 445; *Agra Bank v. Leighton*, L. R. 2 Eq. 56; *Woodward v. Pell*, L. R. 4 Q. B. 55; *Thornton v. Maynard*, L. R. 10 C. P. 695; *Andrews v. Toronto Bank*, 15

decided that the rule in bankruptcy, at all events, was well settled against it, unless, perhaps, the holder proved that he was acting as trustee for some one whose liability was subsequent to that of the bankrupt.

It seems to me, however, that the argument in favor of the proof in full was sound. The better opinion at common law is, that payment by a drawer or indorser does not exonerate the acceptor or maker, unless the promise of the latter was for the accommodation of the former, or there is some other equity which makes the note or bill the debt of the party who has made the payment, or unless he has made it at the request or for the benefit of the acceptor or maker. Byles on Bills (10th ed.), 221, and cases there cited. If this be not the rule at law, still I consider it to be so in bankruptcy. The statute, section 19, adopting the equities of the case, declares that if a surety, or other person liable for a bankrupt (and this undoubtedly includes indorsers), pays or satisfies the debt, or if he remains liable for the whole, or any part of it, he may prove it in bankruptcy, or require the creditor to prove it, in order that he may have the benefit of the dividends. This law does not expressly meet the present case, because the indorsers here have neither satisfied the debt, nor do they remain liable to pay it, but they have taken an intermediate course, by paying a part for a full release of their own liability. Under these circumstances, in the absence of any stipulation one way or another about the maker of the note, who was already a bankrupt, the law will imply that the holder is to prove the whole debt; and, if the dividends are more than enough to pay him in full, after crediting to the surety what he has received from him, the creditor will hold the surplus for the benefit of the surety. This, though not within the exact language of section 19, is fully within its spirit. It is not, however, as a construction of that section that I find the law, but merely that the section recognizes a familiar equity, and takes for granted that a creditor may prove the debt notwithstanding payment in whole or in part by a surety, because he in fact proves as the trustee of the surety. The payment made by the indorser after the maker of the note was a bankrupt, cannot be proved by the surety as money paid, unless it comes precisely within section 19, because it had not been paid at the time of the bankruptcy. It must either be provable as part of the note in the hands of the holder, and for the benefit of the indorser, or not provable at all, and in the latter case it would not be

Ont. App. 648; *Bird v. Louisiana Bank*, 93 U. S. 96 (St. of La. not a bar); *Davis v. McConnell*, 3 McL. 391; *Granite Bank v. Fitch*, 145 Mass. 567; *Mechanics' Bank v. Hazen*, 13 Johns. 353; *Madison Bank v. Pierce*, 137 N. Y. 444; *Concord Bank v. French*, 65 How. Pr. 317; *Logan v. Cassell*, 88 Pa. 288; *Bank of Amiens v. Senior*, 11 R. I. 376.

"If the indorser has paid a part of the amount due on bill or note the holder may collect in full, and hold as a trustee for the indorser *pro tanto*. *Johnson v. Kennion*, 2 Wils. 262; *Walwyn v. St. Quintin*, 1 B. & P. 652; *Reid v. Furnival*, 1 Cr. & M. 338; *North Bank v. Hamlin*, 125 Mass. 506; *Madison Bank v. Pierce*, 137 N. Y. 444; *Ward v. Tyler*, 52 Pa. 393." *Ames Cas. Suretyship*, 427.

barred by the discharge. This was one of the motives for the enactment that the surety may compel the creditor to prove, and it takes for granted, as I have said, that the creditor might prove voluntarily. The case of *Jones v. Broadhurst*, and those which follow it on the one side, or differ from it on the other, deal merely with the fact, or the presumption, whether or not the payment is intended to discharge the debt of the principal debtor; if not, the right of action remains good. The fact in this case is, that the surety gave a certain sum for what is equivalent to a covenant not to sue him, and it is not for the bankrupt to say that his debt is thereby paid, when he has not furnished the means to pay it. *Proof admitted in full.*¹

¹ "*Ex parte De Tastet*, 1 Rose, 10; *In re Ellerhorst*, 5 N. B. R. 144; *Ex parte Harris*, 2 Low. 568; *Re Pulsifer*, 9 Biss. 487, 490, 14 Fed. Rep. 247; s. c. (*semble*); *Dearth v. Hide Bank*, 100 Mass. 540 (*semble*); *Ames v. Huse*, 55 Mo. App. 422, *acc.*

"*Cooper v. Pepys*, 1 Atk. 105; *Ex parte Leers*, 6 Ves. 644; *Ex parte Worrall*, 1 Cox, 309; *Ex parte Taylor*, 1 DeG. & J. 302; *In re Oriental Bank*, L. R. 6 Eq. 582; *Re Blackburne*, 9 Morrell, 249, 252 (*semble contra.*)" *Ames, Cas. Suretyship*, 428.

In Re Swift, 106 Fed. Rep. 65, 70, LOWELL, J., said: "The proving creditor seeks to review the decision of the referee in deducting from the amount proved against the separate estate the amount of the dividend declared on the joint estate. That a creditor may prove for the full amount of a note against both its maker and indorser, and may collect from both estates dividends on such proof until his whole debt is satisfied, is settled law. Where, however, proof against the estate of the indorser is made after part payment by the maker, the proof must be limited to the balance due on the note after deducting the part payment. And it appears to be settled that a dividend from the estate of the maker, declared in favor of the creditor, and payable before proof is made against the estate of the indorser, is the equivalent of actual part payment. In this case, proof against the estate of the maker was made after the declaration of the first dividend. By section 65 c, the creditor making proof after the declaration of the first dividend is entitled to be paid 'dividends equal in amount to those already received by the other creditors, if the estate equal so much before such other creditors are paid any further dividends.' This right of the creditor to a preference in future dividends does not seem to me equivalent to a declaration of a dividend in his favor, or to actual part payment of the note. *In re Hicks*, Fed. Cas. No. 6,456; *In re Hamilton* (D. C.), 1 Fed. 800; *In re Meyer*, 78 Wis. 615, 626, 48 N. W. 55, 11 L. R. A. 841; *Ex parte Todd*, 2 Rose, 202, note. The estate might not be large enough to pay to this creditor the rate declared in favor of the other creditors. Considering the situation as shown in the finding of the referee and in the subsequent stipulation, I think the creditor was entitled to prove for the whole amount of the note against the estate of the indorser. The judgment of the referee is reversed, in so far as it provides for a diminution of the proof presented against the separate estate of E. C. Hodges; in other respects it is affirmed."

ROGER WILLIAMS NATIONAL BANK v. FREDERICK S. HALL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER 24-
NOVEMBER, 28, 1893.

[Reported in 160 Massachusetts, 171.]

HOLMES, J. The question in this case is whether the holder of a partnership note made payable to one partner and indorsed by him to the holder can prove it in insolvency against the estates both of the firm and of the indorsing partner before any dividend is declared on either. The statute is silent. Intimations in favor of the right of double proof are to be found in *Borden v. Cuyler*, 10 Cush. 476, 477, and in *Mead v. National Bank of Fayetteville*, 6 Blatchf. C. C. 180, and in the decisions in *In re Farnum*, 6 Law Rep. 21 (by Judge Sprague), and *Ex parte Nason*, 70 Maine, 363. The United States Bankrupt Act of 1867, § 21, U. S. Rev. Sta. § 5074, is construed to allow the right in terms. *Emery v. Canal National Bank*, 3 Cliff. 507, collecting the cases, and repeating some of the general arguments at length. Formerly an arbitrary rule was worked out by degrees in England ~~that one creditor must elect.~~ *Ex parte Rowlandson*, 3 P. Wms. 405; *Ex parte Moulton*, Mont. 321, Mont. & Bligh, 28, 1 Deac. & Ch. 44, 2 Deac. & Ch. 419; *Goldsmid v. Cazenove*, 7 H. L. Cas. 785, 805. But this rule, after being disapproved by the most eminent judges (*Ex parte Bevan*, 9 Ves. 223, 225, 10 Ves. 107, 109; Story, Part. (7th ed.) §§ 384-386; Eden, Bankruptcy (2d ed.), 181), has been done away with by statute¹ in cases like the present. *Ex parte Honey*, L. R. 7 Ch. 178. In view of the modern decisions and the general agreement of opinion, we think it unnecessary to argue elaborately for the right of a creditor who has required two contracts binding two distinct estates to insist upon both. See further *Fuller v. Hooper*, 3 Gray, 334, 342; *Vanuxem v. Burr*, 151 Mass. 386, 388, 389; *Turner v. Whitmore*, 63 Maine, 526, 528; and *Miller's River National Bank v. Jefferson*, 158 Mass. 111, 113.

*Decree of court of insolvency affirmed.**W. A. Morgan & F. L. Tinkham*, for the appellants.*E. H. Bennett*, for the appellee.¹ 32 & 33 Vict. c. 7, § 37.

EX PARTE HOUGHTON.

DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, MARCH, 1871.

[Reported in 1 Lowell, 554.]

THE petitioners hold a long lease of a shop on Washington Street, Boston, and on the thirtieth day of May, 1868, they underlet the shop to James Fortune, the bankrupt, for eight years and ten months from the first day of the next June, being two days less than their own term, at a rent which was payable monthly and very largely in advance of what they paid. Fortune covenanted to pay the rent, and all taxes which should be assessed on said premises during said term, to make no alterations without the written consent of the petitioners, and to keep the premises in as good order as at the beginning of the term, reasonable use, &c., excepted. The petition in bankruptcy was filed June 9, 1869. The petitioners alleged a breach of all these covenants, and have proved for all arrears of rent, without objection. They took possession of the premises early in September, 1869, on the day on which they saw a notice in the newspaper of the adjudication in bankruptcy, and say that they found the shop injured by alterations to the extent of five hundred dollars. They have since relet the shop at a reduced rent, and they asked to have the damages suffered by them in the reletting of the estate as well as the damage by the alterations assessed by the court or by a jury. They also offered to prove as preferred debts the city and State taxes assessed on the premises by the city of Boston for the years 1868 and 1869, which were assessed to the owner of the estate, and paid by the petitioners as required by the terms of their lease from the owner.

At a hearing before the court the facts above mentioned were proved, and it further appeared that the lease contained this clause: "Provided also, and these presents are upon condition, that if the lessee or his representatives or assigns do or shall neglect or fail to perform and observe any or either of the covenants . . . or if the lessee shall be declared bankrupt or insolvent according to law, or if any assignment shall be made of his property for the benefit of creditors, then, and in either of the said cases, the lessors, or those having their estate in said premises may, immediately, or at any time thereafter, and whilst such neglect or default continues, and without further notice or demand, enter into and upon the said premises, or any part thereof, in the name of the whole, and repossess the same, as of their former estate, and expel the lessee, &c. . . . without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant, and that upon entry, as aforesaid, the said term shall cease and be ended."

E. Avery, for the petitioners.

B. F. Brooks, for the assignees.

LOWELL, J. The most important question is, whether the petitioners can prove for the damages suffered by them in reletting the premises. The earlier law of England, which we have adopted in this country, was that the assignees of a bankrupt have a reasonable time to elect whether they will assume a lease which they find in his possession, and if they do not take it the bankrupt retains the term on precisely the same footing as before, with the right to occupy, and the obligation to pay rent; if they do take it he is released as in all other cases of valid assignment, from all liability excepting on his covenants, and from these he is not discharged in any event. Henley on Bankruptcy (3d ed.), 237; Auriol v. Mills, 4 T. R. 94; Copeland v. Stevens, 1 B. & A. 593; Tuck v. Fyson, 6 Bing, 321; Robson on Bankruptcy, 328. This rule was long since modified in England by statutes 49 Geo. III. ch. 121, § 19, and 6 Geo. IV. ch. 16, § 75, by which the bankrupt was released from his covenants if either the assignee accepted the lease, or the bankrupt himself surrendered it to his lessor within fourteen days after notice that the assignee had declined. This remained the law by re-enactment in the several divisions of the bankrupt acts down to the latest in 1869, 32 & 33 Vict. ch. 71, § 23, which authorizes an assignee to disclaim any onerous property or contract, and deprives the bankrupt of all interest therein whether the assignee disclaims or not, and gives any person "injured by the operation of this section" the right to prove the amount of his injury as a debt under the bankruptcy. This is the first legislative recognition that I have found of any debt of the character now sought to be proved, and the petitioners have failed to discover any judicial determination of a similar right. The American authorities follow the line of reasoning and decision of the earlier English cases, and hold that a lessor has no provable debt, contingent or otherwise, for the reason that rent accrues from time to time, and is not and cannot be due *in solido* beforehand, since it depends on occupation from time to time.

Leaving out of view for the moment the peculiar clause of this lease relating to bankruptcy, which the petitioners say they have never acted on, and overlooking the fact of their re-entry, how did the bankruptcy affect this lease? The assignees did not assume the lease, and consequently the original parties stand simply as landlord and tenant. If the bankrupt can find means to pay his rent, or can find a purchaser for the lease, no one is injured; if he cannot, the lessors may re-enter. Where are the unliquidated damages to be assessed against the estate of the bankrupt? In the very useful and accurate work of Mr. Taylor on Landlord and Tenant, § 457, it is suggested that the question whether future rent can be proved as a debt in bankruptcy must depend on the particular language of the several statutes, and that under the broad authority to prove contingent debts contained in some of these acts, such proof might, perhaps, be made. The latter part of the suggestion is not supported by any decision, and seems rather a prophecy of the English "bankruptcy act" of 1869 than a gloss upon any

which had preceded it. The United States act of 1841 gave very full power to prove contingent debts and even to have them valued, but future rent was held not to be within its terms. *Bosler v. Kuhn*, 8 Watts & S. 183; *Savory v. Stocking*, 4 Cush. 607. There is, no doubt, strong reason for passing such a law, but the existing law does not cover the case. It is not uncommon now for leases to contain a provision that in case of breach the lessor may enter and relet the estate at the expense and risk of the lessee and charge him with the deficiency. Under such a clause a lessor might well have the right to prove for the full amount of the damages which should be ascertained by such reletting. Such a case would be analogous to that arising under the bankruptcy of the Metallic Compression Casting Company, which had contracted in writing with a skilled workman to employ him for a fixed time at a fixed rate of wages, and had discharged him when they stopped payment. I ruled to the jury that the workman had his election to sue for his wages from time to time, or to proceed at once for unliquidated damages, and when the company were in bankruptcy might have his damages assessed under § 19, and proof for the amount of the verdict: a ruling which was excepted to, but the case was not carried further, and I see no occasion to doubt the soundness of the instruction. But rent stands on a very different foundation, because there is no right of action at the time of the bankruptcy, excepting for the arrears.¹

There is another sufficient answer to this part of the case. The petitioners have availed themselves of the power of re-entry, and have put an end to the estate of the bankrupt and repossessed themselves "as of their former estate." Such an entry is an eviction, and puts an end to the rent by operation of law, and by the terms of this lease, though by law and by contract they do not thereby waive any existing right of action for rent in arrear, or "preceding breach of covenant." This is all that their disclaimer amounted to, and if it were not, they cannot be heard after they have entered and exercised all acts of ownership and relet the premises, to say that they have not entered as lessors nor to repossess the premises, but merely as agents of the lessee, and to save the estate from waste. We have already seen that this lease confers no power or agency upon the petitioners in this matter, and their entry must be taken to be according to their right. It is immaterial whether the bankruptcy was the breach for which they entered; it is enough that they have entered lawfully, and have ended the term and the rent together. If the lease had been valuable, and they had relet the shop for an increased rent, I do not see how the assignees could have made any valid objection to the re-entry.

The petitioners have not waived any right they had before entry, and may prove for such damages as they have suffered by the changes made in the stairway and shelves. The case was heard by the register, Mr.

¹ *Re Webb*, 6 B. R. 302; *Re Hufnagel*, 12 B. R. 554; *Re May*, 7 Ben. 238; *Ex parte Lake*, 2 Low. 544; *Bailey v. Loeb*, 2 Woods, 578 acc.

Ellis, whose rulings were in accordance with my views in every particular. I find on this point that he refrains from assessing the damages, and refers the whole matter to the court. It was said at the argument that the register had once assessed these damages at seventy-six dollars, after a full hearing. If so he must have reviewed his decision, for he reports a mere reference to the court, and by consent of the parties omits the evidence. Upon the proofs before me I consider fifty dollars to be ample damages, and assess the same accordingly.

The petitioners are entitled to prove for one year's taxes. Any argument which shall establish their right to prove for those of 1868 will be equally strong to prevent the proof for 1869. The covenant is to pay all taxes assessed during the term, and taxes are assessed as of the first day of May. The tenancy began June 1, 1868, and ended about September 1, 1869. It seems to me that under this covenant the lessee was bound to pay the taxes for 1869, and not those for 1868, and the former having been due in theory of law at the time of the bankruptcy, though not payable until afterwards, may be proved. This debt is not entitled to preference, because as between these parties it rested in contract merely, and was to all intents and purposes a part of the rent. The taxes were not assessed to the bankrupt nor to the petitioners, and the city had no right to prove them in the bankruptcy. There is no right of preference or lien to which the petitioners can be subrogated, but only a right of action over against Fortune, if he should neglect to pay the taxes to the petitioners on demand after they had themselves paid them. Parol evidence was offered to show that both parties understood that the taxes of 1868 were to be paid by the tenant, but such evidence was inadmissible, and was rightly taken by the register only *de bene*. There was no offer to show a new contract by parol founded on a new consideration, but merely to explain the lease. *Let orders be drawn in accordance with this opinion.*

EX PARTE FAXON. RE LAURIE, BLOOD & HAMMOND.

DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, 1869.

[Reported in 1 Lowell, 404.]

THE bankrupts hired a large and valuable shop of the petitioners, and paid the quarter's rent, which fell due January 1, 1869. On the eighth of that month a petition was filed against them in bankruptcy, but was not pressed to an early trial, and the adjudication took place March 26, 1869. The assignees occupied the store for two or three months, and paid rent from March 26, but no arrangement was made between them and the petitioners concerning the rent from January 8

to that day, and the petitioners now applied to have it paid in full by the assignees. The case was submitted on facts agreed.

E. Avery & G. M. Hobbs, for the petitioners.

B. F. Brooks, for the assignees.

LOWELL, J. An assignee in bankruptcy, unless restrained by the terms of the lease itself, may adopt or reject a term, as he finds most beneficial for the creditors, and may take a reasonable time to decide the question. If he takes the lease he makes himself liable, on behalf of the estate, for the rent, including at least that of the current quarter, and this he must consider in determining whether to adopt the lease. The petitioners would have done more wisely, perhaps, to insist on this at the time, but I see no ground for saying they have waived any of their rights. In theory of law, the assignees have been in possession ever since the petition was filed, and not only from the date of the adjudication, which is merely a finding that the petition is well founded. If the quarter-day had come round pending the petition, the bankrupt would have been authorized, if he found it necessary for the best interests of his creditors, to pay the rent in order to save an ejectment. I have more than once permitted this to be done. And the assignees, by the course they have taken, affirm this to be a case in which such a course was prudent and proper.

The only reported case which I have seen is very short, and gives no reasons or arguments, but the decision agrees with my opinion. There the assignees were required to pay rent from the date of the petition. *Re Merrifield*, 3 B. R. 25. I do not know that any question was raised in that case, to distinguish the date of the petition from that of the adjudication; but if an assignee is to pay only for his own occupancy, he must be charged from the date of the assignment. There is no argument which will make him liable from the adjudication that does not apply to the date of the petition, which is the true beginning of the proceedings, and the controlling date in all these matters.

*Petition granted.*¹

ATKINS v. WILCOX.

CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT,
DECEMBER 18, 1900.

[Reported in 105 Federal Reporter, 595.]

BEFORE PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. On the 4th day of May, 1899, Leopold Keiffer, by a written lease, rented from the appellant, Mrs. Sarah E.

¹ As to the liability of the assignee in bankruptcy to pay rent under the act of 1867, see *Re Merrifield*, 3 B. R. 98; *Re Ten Eyck*, 7 B. R. 26; *Re Dunham*, 7 Phila. 611; *Central Trust Co. v. Wabash, &c. Ry. Co.* 34 Fed. Rep. 259, 267.

Atkins, certain premises described in the lease for the term of one year, commencing on the 1st day of October, 1899, and ending on the 30th day of September, 1900, for a monthly rental of \$333.33 $\frac{1}{3}$, for which Keiffer executed and delivered to the appellant twelve rent notes, bearing even date with the lease, and payable to the lessor, one on the 1st day of November, 1899, and one on the 1st day of each and every succeeding month (except the last one, payable on the 30th of September), fixing the interest at the rate of 8 per cent per annum from maturity until paid. The lease recited that should the property be destroyed by fire, or should the lessee be deprived of the use of the premises by some other unforeseen event, not due to any fault or neglect on his part, then he should be entitled to a credit for the unexpired term of the lease, and the corresponding proportion of rent notes should be annulled and returned to him. At the time of the making of this lease Keiffer was in possession of the premises under a lease of similar import bearing date 8th of June, 1898, which provided for a term of one year, commencing on the 1st day of October, 1898, and ending on the 30th day of September, 1899. On October 3, 1899, Keiffer presented his petition to the court of bankruptcy to be adjudged a bankrupt, which petition, in the judge's absence, was referred to a referee, who on the same day declared and adjudged the petitioner to be a bankrupt. By a stipulation of the parties, only certain portions of the record in the bankrupt proceeding were brought up on this appeal, from which it appears that the appellant made proof of a secured debt against the estate of the bankrupt on October 31, 1899, claiming the aggregate amount of the twelve rent notes given and held under the lease of date May 4, 1899, and to become payable as above recited. The claim and proof thereof embraced other items, which do not require further notice here. On November 21, 1899, this proof of debt was filed by the referee. The record we have does not show any further action in the bankrupt estate until March 7, 1900, when an account of C. O. Wilcox, trustee of the estate of Leopold Keiffer, bankrupt, was presented to and filed by the referee, who thereon made an order of that date, as follows: "Let a meeting of creditors be held on March 20, 1900, at 3 p. m. Let them be notified according to law, and that they do show cause on the above date why said account should not be approved and homologated." The account showed the receipt of all of the funds that had come into the hands of the trustee, aggregating \$3,651.44. It also showed twenty items of disbursement that had been made by the trustee, and bore an item, "Reserved for future costs, \$150.00," which, added to the disbursements, aggregated \$2,253.77. Among the disbursements is the following: "Mrs. Sarah E. Atkins, landlord. Rent for September, October, and November, 1899, three months, at \$333.33 $\frac{1}{3}$, \$1,000.00." On March 20, 1900, the appellant appeared before the referee, and filed her written opposition to the account submitted by the trustee, on the ground that she had proved her claim for rent for the whole of the twelve months specified in the lease of May 4, 1899

(and other grounds not necessary here to notice), and that by the laws of Louisiana she has a lien of the first rank on all the property in the leased premises, and that the total assets in the hands of the trustee and on deposit to the credit of the estate were realized from the sale of the property contained in the leased premises, and subject to her lien, wherefore she opposes each and every item on said account, and prays that she be declared entitled to a lien first in rank on all the property contained in the leased premises, or on the proceeds, and that the account of the trustee be amended, and he be ordered to pay to her the full amount of her claim in preference to all other claims. The referee rejected her claim for the months of December, 1899, to September, 1900, inclusive, for reasons elaborately given in his judgment thereon, from which judgment Mrs. Atkins appealed to the judge sitting in the court of bankruptcy, by whom the judgment of the referee was affirmed, and she prosecutes this appeal.

It appears that the trustee occupied the premises during the months of October and November, 1899, and that he allowed and paid on Mrs. Atkins' claim for rent the rent which accrued for the months of October and November, under the current lease, at the rate and amount of the notes which had been given therefor. The appellant insists that the trustee was without right or interest to contest the lien of the opponent, as it was claimed in her proof of debt. We are clear that this position is not well taken. By the express terms of the statute the trustee is selected by the creditors. By the clearest implication he represents all the creditors, and as such representative has an interest in the just administration of the estate which belongs to the creditors. Moreover, this right is expressly recognized in the sixth paragraph of general order in bankruptcy 21 (32 C. C. A. xxii., 89 Fed. ix.), which has itself the force of a statute, even if not clearly founded on the text of the statute, which we think it is. It appears to give the trustee precedence even of the creditors, for the language is that, "when the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may," etc. The appellant by her proof of debt appears to found her claim, in part at least, on the following provision in the lease: —

"Should the lessee at any time fail to pay the rent punctually at maturity as stipulated, the rent for the whole unexpired time of this lease shall, without putting said lessee in default, at once become due and exigible."

In her affidavit in support of her claim she contends: —

"According to the terms of said lease, the note maturing November 1-4, 1899, not having been paid, then the whole unexpired amount of said lease represented by said notes becomes due and exigible."

At the date of the adjudication in bankruptcy, and at the date when the debt was proved, there had been no default in the payment of rent under the then current lease, or any violation of its conditions which would render the notes, or any of them, given for

the rent that was to accrue due and exigible, and authorize the lessor to enforce her lien on the property then in the leased premises for the payment of all or any one of the rent notes given and held under that lease. The lease does not provide in express terms that the bankruptcy of the lessee would have the effect to mature the notes and render them exigible. The present bankruptcy act has no direct provision on this subject. The bankruptcy act of 1867 contained this provision: —

“Where the bankrupt is liable to pay rent or other debt falling due at fixed and stated periods, the creditor may prove for a proportionate part thereof up to the time of the bankruptcy, as if the same grew due from day to day, and not at such fixed and stated periods.” Section 19.

No such provision, or its equivalent, appears in the present act. Its language applicable to the case we are considering is that debts of the bankrupt may be proved and allowed against his estate which are a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with a rebate of interest upon such as were not then payable and do not bear interest. Section 63. This provision has not yet been construed by the Supreme Court, nor, as far as we are advised, by any one of the circuit courts of appeals. The National Bankruptcy News reports show that it has been frequently ruled on by referees in bankruptcy, and by four of the judges for districts in other circuits. In the opinions of the referees and of the judges of the courts of bankruptcy, just referred to, there is a marked unanimity to the extent that rent to accrue in the future, if it can be called a debt, is a contingent one, both as to its amount and as to its very existence, and that there is no provision in the act of 1898 which allows proof of such debts. In the very nature of the case, there is great diversity of view as to the ground on which this ruling is placed. The opinions and judgments necessarily have relation to the terms of the contract of lease out of which the claim for future rent grew, and are largely controlled by the particular provisions of the respective instruments. Some of the opinions, however, take ground broad enough to cover the subject, without reference to the terms of leases in general use. The judge for the district of Kentucky in his opinion uses this language: —

“The court sees no way to avoid the conclusion that the relation of landlord and tenant in all such cases ceases, and must of necessity cease, when the adjudication is made. If the relation does cease, the landlord afterwards has no tenant, and the tenant has no landlord. At the time of the adjudication the bankrupt is clearly absolved from all contractual relations with, and from all personal obligations to, the landlord growing out of the lease, subject to the remote possibility that his discharge may be refused, — a chance not worth considering. After the adjudication there is no obligation on the part of the tenant grow-

ing out of the lease. He not only owes no subsequent duty, but any attempt on his part to exercise any of the rights of a tenant would make him a trespasser. His relations to the premises and to the contract are thenceforth the same as those of any other stranger. He cannot use nor occupy the premises. No obligation on his part to pay rent can arise when he can neither use nor occupy the property. The one follows the other, and it seems clear that no provable debt, and, indeed, no debt of any sort, against the bankrupt, can arise for future rent. No rent can accrue after the adjudication in such a way as to make it the debt of the bankrupt, and future rent has not, in any just sense, accrued before the adjudication." *In re Jefferson* (D. C.), 93 Fed. 951.

The judge of the court for the Eastern District of North Carolina seems to concur in the views just stated. In his opinion we find this language: —

"As to the rent of the bank: The contractual relations being terminated, a landlord is not entitled to prove a claim for rent against a bankrupt after such bankrupt ceases to use the building. The relations of landlord and tenant are severed by operation of the bankruptcy law. The trustee of his estate may, after adjudication, occupy and use the rented or leased premises for the estate; but under such circumstances it would be chargeable to the estate, not as rent under bankrupt's contract, but as cost and expenses of administering the same." *Bray v. Cobb*, 2 Nat. Bankr. N. 588, 100 Fed. 270.

Touching the language above quoted from the opinion of Judge Evans (*In re Jefferson, supra*), Judge Lowell, of the Massachusetts district, says: —

"With all respect for the learned judge, I must think the above remarks made somewhat hastily, unless they are to be taken as limited to the particular lease in question, or made to depend upon some peculiar provision of the Statutes of Kentucky. Let us consider an actual example. A lease recently examined was made for a term of several hundred years, upon a payment of sixteen thousand dollars at the beginning of the term, and subject to a future rent of one dollar a year if demanded by the lessor. Clearly this would be an asset of a bankrupt's estate which the trustee would almost certainly elect to assume, and I can find nothing in the bankruptcy act which would terminate the lease and entitle the landlord to possession. Many existing ground leases, also, would certainly be assumed by a trustee in bankruptcy of the lessee, and it would be unjust to hold them terminated by the adjudication. It follows, then, that the lease here in question was not determined by the bankruptcy of the lessee, but only by the re-entry of the lessor."

The actual example proposed for consideration by Judge Lowell is a leasehold in form, certainly, but it appears to be substantially, in fact, a purchase of the freehold for a present consideration paid in cash at the beginning of the term, and to have value as an asset equal to the current market price of the freehold in the premises let. It is an estate

with such an inconsiderable burden as may well be disregarded, and, as the learned judge says, clearly this would be an asset of a bankrupt's estate which the trustee not only would almost certainly elect to assume, but which the creditors, or the court on their motion or on its own motion, would compel him to assume. The doctrine of election to which he refers sprung out of the state of the law in bankruptcy as it was at an early time in England construed by the common law courts. The rule as then announced has been greatly modified in England by statutes passed from time to time, and the decision of the English courts on these various statutes, and the decisions of the State court in this country on the various insolvency acts, are more interesting than helpful in our effort to construe the provision of our bankruptcy law now in force. Moreover, the question as to the effect that the adjudication in bankruptcy has on the relations subsisting between the landlord and tenant, while it is kindred to the question with which we are dealing, its connection therewith is by no means vital. The language of our statute affecting the claim here involved requires that the debt shall be a fixed liability absolutely owing at the time of filing the petition. Under the insolvent law of the State of Massachusetts prior to the statute of 1879, only such debts (with certain exceptions) were provable as were "absolutely due" at the time of the first publication of the notice of issuing the warrant of insolvency. The case of *Bowditch v. Raymond*, 146 Mass. 109, 15 N. E. 285, shows that the language "absolutely due" was treated as exactly equivalent to the language "absolutely owing," as it must be, for the statute provided for proving debts payable at a future date. After referring to numerous cases in which it had been held that under that statute future rent to accrue under a lease in which the insolvent debtor is lessee cannot be proved, it is said: —

"The principle of these cases is that such rent is not a debt absolutely due at the time of the first publication. The lease may be terminated by the eviction of the lessee or otherwise, and no rent may ever accrue or become due. The lessor's claim is a contingent one. It is not contingent merely as to amount, but the very existence of the claim depends upon a contingency," — referring to *Boardman v. Osborn*, 23 Pick. 295.

Further on in the opinion it is said: —

"The existence of any debt in the future depends upon contingencies, and therefore the appellants' claim cannot be proved under our insolvent law prior to the statute of 1879."

In the lease before us the lessee binds himself —

"To make no sublease, nor transfer said lease in whole or in part, nor use the premises for any other purpose than that herein contemplated, without the written consent of the lessor."

And again it declares: —

"And, should the lessee in any manner violate any of the conditions of this lease, the lessor hereby expressly reserves to himself the right of cancelling said lease without putting the lessee in default; the lessee

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Bankrupt v. Osborn
p 479.*

hereby assenting thereto, and expressly waiving the legal notice to vacate the premises."

It is not so clear that this leasehold is an asset of the bankrupt's estate which the trustee would almost certainly elect to assume, or that the court should on its own motion, or on the motion of creditors, require him to assume. Nor is it quite clear what he could do with it if he did assume it. It is not necessary for us to hold that the adjudication in bankruptcy terminated this lease and absolved the relations between the landlord and the tenant thereby created, nor is it necessary or prudent to announce in advance what the holding should be in any given case which may possibly arise. We therefore content ourselves with announcing that, in our opinion, there was no error in the judgment of the district court rejecting the appellant's claim. That judgment is therefore affirmed.¹

¹ Proof for rent not due before bankruptcy was not allowed under the early English acts, and the bankrupt remained liable on his covenant to pay rent even though the assignees had accepted the lease. *Mills v. Anriol*, 1 H. Bl. 433; *Anriol v. Mills*, 4 T. R. 94; *Boot v. Wilson*, 8 East, 311. By 49 Geo. III., c. 121, § 19, where the assignees accepted the lease, the bankrupt was discharged. Where they declined he still remained liable. *Copeland v. Stephens*, 1 B. & A. 593. But by 6 Geo. IV. c. 16, § 75, the bankrupt was allowed to free himself from liability where the assignees declined the lease by surrendering it to the landlord. No proof for rent not due at the date of the filing of the petition was allowed, however, until an express provision allowing proof for a proportionate part of rent and other payments falling due at fixed periods was inserted in 24 & 25 Vict. c. 134, § 150. This was repeated in subsequent acts, 32 & 33 Vict. c. 71, § 35; 46 & 47 Vict. c. 52, sched. 2, par. 19, and was copied by Congress in the act of 1867 (§ 19).

In this country rent not due before the bankruptcy has never been held provable unless expressly made so by statute. *Re Bell*, 85 Cal. 119; *Rodick v. Bunker*, 84 Me. 441; *Savory v. Stocking*, 4 Cush. 607; *Treadwell v. Marden*, 123 Mass. 390; *Deane v. Caldwell*, 127 Mass. 242; *Bowditch v. Raymond*, 146 Mass. 109, 114; *Wilder v. Peabody*, 37 Minn. 248; *Re Shotwell*, 49 Minn. 170 (*conf.* *Kalkhoff v. Nelson*, 60 Minn. 284); *Re Hevenor*, 144 N. Y. 271 (*conf.* *People v. St. Nicholas Bank*, 151 N. Y. 592); *Hendricks v. Judah*, 2 Caines, 25; *Bosler v. Kuhn*, 8 W. & S. 183; *Weinman's Estate*, 164 Pa. 405.

As complete a statutory solution as any of the difficulty in regard to leases is contained in the Massachusetts Insolvency Law, Pub. Stat. c. 157, § 26. "When any of the property of a debtor consists of a lease or agreement in writing, whereby he is liable for the rent therein reserved, or for the use and occupation of premises as therein stipulated, the assignee at any time may, and at the request in writing of either the debtor, or of the lessor, or of those having his estate in the premises, shall, within twenty days after such request, by a written instrument filed with the records of the case, elect either to accept and hold under said lease or agreement in writing, or to disclaim the same; and, if he elects to disclaim, such lease or agreement in writing shall thereupon be deemed to have been surrendered as of the day on which said disclaimer was so filed. And the debtor, provided he obtains his discharge in insolvency, shall be discharged from all liability under or by reason of said lease or agreement in writing, whether the assignee does or does not disclaim as aforesaid; and the lessor, or those having his estate in the premises, may prove such damages, if any, as are caused by such surrender, as a debt, against the estate of the debtor."

There is no wrongful conversion of note can be
brought after discharge

PARKER v. NORTON.

KING'S BENCH, MAY 31, 1796.

[Reported in 6 Term Reports, 695.]

THIS was an action of trover for a bill of exchange drawn the 28th of February, 1795, by the plaintiff on and accepted by J. B. Fowler for £24 19s., payable two months after date to the plaintiff or order; to which the defendant pleaded: First, the general issue; secondly, his bankruptcy before the cause of action arose; and thirdly, that before the time of the supposed conversion the plaintiff sent and delivered to the defendant, and the defendant received from the plaintiff, the said bill of exchange, to the intent that the defendant might present the same when due to Fowler for payment, and might receive from Fowler the money therein mentioned, to and for the use and on the account of the plaintiff, and might remit the said money to the plaintiff when he should have so received the same; that before the bill became due, to wit, on the 1st of March, 1795, the defendant discounted the bill, and gave away and exchanged the same for money, and received the value thereof in money, and kept and applied the money so by him received to his own use, which is the same supposed conversion and cause of action, etc. The defendant then set forth in this plea all the circumstances necessary to show that he had become a bankrupt on the 19th of March, 1795. It also stated that the defendant had since obtained his certificate, though it did not set forth that that certificate had been allowed by the Lord Chancellor. And it concluded with an averment that the supposed conversion, and the cause of action mentioned in the declaration, accrued before the defendant became a bankrupt.

Issue was taken on the first plea; and the plaintiff demurred generally to the two last.

Laves, in support of the demurrer.

Abbot, contra.

LORD KENYON, C. J. Some of the arguments that have been addressed to us on behalf of the defendant are founded on the supposition that this is a compassionate case: even if that supposition were true, we could not decide the case in his favor against the rules of law. But if ever a case was brought before a court of justice that was entitled to less favor than others; this, as it is disclosed on the part of the defendant, is that case.

The plaintiff, being the owner of a bill of exchange, intrusted it to the care of the defendant in order that when it became payable he should obtain payment; the latter, without waiting for the day of payment, and in violation of his trust, discounted the bill, received less than its value, and applied the money to his own use. This is certainly a dishonorable transaction; but still if the rules of law protected him in this dishonesty, we could not deprive him of this protection. However,

I am glad that the law will not protect him in this case. When the case of *Goodtitle v. North*, Douglas, 583, was argued here, Lord Mansfield put an end to it by one observation, "The form of the action is decisive." The action of trover is founded on a tort. The defendant's case is rested on the dictum of a very respectable judge in the case of *Johnson v. Spiller*, Douglas, 167. But I understand Mr. J. Buller, in using the words attributed to him, to have meant only this, that if a person has his election of two remedies, and may either bring trover or any other action, the possibility of his electing to bring trover shall not prevent his proving his debt under the commission of bankrupt if he will waive the tort; and I assent to the proposition so qualified. In the present case the defendant did not receive all the money which was due on the note, the discount was deducted. If the plaintiff, after considering what remedy he should take, had brought an action for money had and received, he would have affirmed the act of the defendant, and the bankruptcy and certificate would have been an answer to that action. But can it be said that the plaintiff was bound to resort to such an action, and to abandon the rest of his demand? If he were, the same rule must prevail in other cases. Suppose, instead of this being a bill for twenty-four pounds it had been a bill for so many thousand pounds and payable at a distant day, and the defendant had discounted it, would it be giving satisfaction to the plaintiff either in justice or conscience to compel him to receive a part instead of the whole amount of the bill? When this bill was deposited with the defendant, it was his duty to wait until the day of payment before he received the money, and then to carry the money to the plaintiff; instead of which he has for his own convenience received a part instead of the whole value of the bill, and converted the money to his own use. In this case, therefore, the remedy by an action for money had and received would not have done the plaintiff complete justice; and though he might have waived asserting his right to the full extent, the law will not compel him to do so. On the whole I am clearly of opinion, on principles of law and justice, that the plaintiff may maintain this action of trover.¹

Held claim for profits for infringement of patent not provable.

IN RE BOSTON & FAIRHAVEN IRON WORKS.

CIRCUIT COURT FOR THE DISTRICT OF MASSACHUSETTS, APRIL 30, 1885.

[Reported in 23 Federal Reporter, 880.]

COLT, J. On March 2, 1878, the Boston & Fairhaven Iron Works filed a petition in bankruptcy in the United States District Court of Massachusetts, and were adjudged bankrupts. On the 22d of March, 1880, one Cyril C. Child, of Boston, recovered judgment in the United

¹ ASHURST, GROSE, and LAWRENCE, JJ., delivered concurring opinions.

States Circuit Court for this district against the bankrupt corporation, for the sum of \$5,640.26, and \$1,773 28 costs of suit, upon a claim for profits from the infringement of a patent. On July 19, 1884, the proof of claim was duly presented before the register, who refused to allow the same, upon the ground that it appeared to be a claim for damages for infringement of a patent-right not converted into a judgment, or otherwise liquidated, prior to the date of bankruptcy. Subsequently the District Court held that the claim was provable against the estate under section 5067 of the Revised Statutes. This ruling was based upon the assumption admitted by counsel that the decree in the patent suit was not for damages, but for the profits of the bankrupt corporation, as an infringer of the patent. The present hearing arises on an appeal by the assignees to this ruling of the District Court.

A claim for damages for a tort is not a claim provable in bankruptcy, unless liquidated or reduced to judgment prior to the date of proceedings in bankruptcy. *In re Schuchardt*, 15 N. B. R. 161; *Black v. McClelland*, 12 N. B. R. 481; *In re Hennocksburgh*, 7 N. B. R. 37.¹

A claim for an account of profits against an infringer of a patent-right has been held to be provable in bankruptcy, on the ground that it is not a claim for damages, but is more like an equitable claim for money had and received, for the use of the patentee, the wrong-doer being a trustee of the profits for the patentee. *Watson v. Holliday*, 20 Ch. Div. 780; *Re Blandin*, 1 Low. 543.

But this view has been disapproved by the Supreme Court in *Root v. Railway Co.*, 105 U. S. 189, 214, where, upon careful consideration, it was held that the infringer of a patent-right was not a trustee of the profits derived from his wrong for the patentee; that to hold otherwise would, in effect, extend the jurisdiction of equity to every case of tort where the wrong-doer had realized a pecuniary profit from his wrong. The court decided that a bill in equity for a naked account of profits and damages against an infringer of a patent could not be sustained upon the ground that the infringer was a trustee for the profits. See also *Child v. Boston & Fairhaven Iron Works*, 137 Mass. 516, recently decided by the Supreme Court of Massachusetts.

It seems to us that the reasoning of the court in *Root v. Railway Co.* is decisive of the question raised by this appeal. It follows that the claim of Child was not a claim provable against the estate of the bankrupts, and should not be allowed, and that the ruling of the District Court should be reversed.

¹ A judgment rendered before bankruptcy, though for a tort, has been provable under all bankruptcy statutes. *Robinson v. Vale*, 2 B. & C. 762; *Greenway v. Fisher*, 7 B. & C. 436; *Re Book*, 3 McLean, 317; *Re Wiggers*, 2 Biss. 71; *Re Hennocksburgh*, 7 B. R. 37; *Howland v. Carson*, 16 B. R. 372; *Hays v. Ford*, 55 Ind. 52; *Ex parte Thayer*, 4 Cow. 66; *Hayden v. Palmer*, 24 Wend. 364; *Comstock v. Grout*, 17 Vt. 512. See also *Bangs v. Watson*, 9 Gray, 211; *Pierce v. Eaton*, 11 Gray, 398; *Wolcott v. Hodge*, 15 Gray, 547; *Re Comstock*, 22 Vt. 642. But a mere verdict or award is not sufficient. *Buss v. Gilbert*, 2 M. & S. 70; *Ex parte Brooke*, 3 Ch. D. 494; *Black v. McClelland*, 12 B. R. 481; *Zimmer v. Schleeauf*, 115 Mass. 52; *Hodges v. Chace*, 2 Wend. 248; *Kellogg v. Schuyler*, 2 Denio, 73.

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Verdict for \$1,000 for breach of promise, then petition
then motion for new trial refused, judgment
discharge. Held — provable under 6 S. (4) & 6
527 - 4

SECT. L.]

IN RE FIFE.

IN RE FIFE.

DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA,
JUNE 14, 1901.

[Reported in 109 Federal Reporter, 880.]

B. C. Christy, for bankrupt.

E. J. Smart, for creditor.

BUFFINGTON, District Judge. This case arises upon the return to a writ of *habeas corpus*, granted on petition of Robert Fife, the bankrupt, and directing the sheriff of Allegheny County to produce the said Fife before this court, together with the cause of his detention. On January 8, 1901, one Jennie Hawk obtained a verdict for \$1,000 against Fife in the Court of Common Pleas No. 2 of Allegheny County, in a suit brought by her against him in that court. That action was based on a contract to marry, and the damages alleged and recovered were for breach by defendant of such contract. On April 8, 1901, the defendant, who is the present petitioner, filed a petition of voluntary bankruptcy, and was adjudged bankrupt. The above-stated claim of Jennie Hawk was scheduled as a debt. On May 2, 1901, a pending motion for a new trial was discharged, and judgment entered against the defendant. On May 31, 1901, the bankrupt was arrested by the sheriff of Allegheny County on a writ of *capias ad satisfaciendum* issued in said case, and placed in the jail of Allegheny County. Thereupon the bankrupt prayed issue of a writ of *habeas corpus*. To this writ the sheriff returns the *capias* as a cause of detention. General order in bankruptcy provides: —

“If the petitioner during the pendency of the proceedings in bankruptcy be arrested or imprisoned upon process in any civil action, the District Court, upon his application, may issue a writ of *habeas corpus* to bring him before the court to ascertain whether such process has been issued for the collection of any claim provable in bankruptcy, and if so provable he shall be discharged; if not, he shall be remanded to the custody in which he may lawfully be.”

We therefore inquire, is the Hawk claim, to enforce which the *capias* issued, provable in bankruptcy? Section 63 of the present bankrupt law, under the heading, “Debts which may be proved,” provides: —

“Debts of the bankrupt may be proved and allowed against his estate which are . . . (4) founded . . . upon a contract express or implied; and (5) founded upon provable debts reduced to judgment after the filing of the petition and before the consideration of the bankrupt’s application for a discharge,” etc.

The word “debt” in the bankrupt law is not restricted to its strict legal meaning, viz., “a sum of money due by certain and express agreement,” but is defined by statute (Bankr. Law, § 1, cl. 11) to “include any debt, demand, or claim provable in bankruptcy.” After

due consideration, we are of opinion the claim in this case is provable. It is based on contract, and falls within the express terms of the statute recited above. The breach occurred and the right of action accrued before the petition in bankruptcy was filed. The plaintiff's contractual claim was therefore provable under the fourth provision, above quoted, and was subsequently reduced to judgment under the fifth. Being, then, of opinion the detaining process issued for the collection of a claim provable against the estate of Robert Fife in bankruptcy, it is therefore, in accordance with General Order 30 (32 C. C. A. xxx., 89 Fed. xii.), ordered that said Fife be discharged from custody.¹

*Even accrued alimony is not provable
& not discharged. in O.C.*

AUDUBON v. SHUFELDT.

SUPREME COURT OF THE UNITED STATES, APRIL 8—MAY 20, 1901.

[Reported in 181 United States, 575.]

MR. JUSTICE GRAY delivered the opinion of the court.

This was an appeal from an order of the Supreme Court of the District of Columbia sitting in bankruptcy, granting a discharge to Robert W. Shufeldt.

Shufeldt had been adjudged a bankrupt April 5, 1899, on his petition alleging that he was indebted to the amount of \$4,538.33, and had no assets which were not exempt under the Bankrupt Act of 1898. The debts from which he sought release were as follows:—

Secured debt to Washington National Banking and Loan Association		\$3,200.00
Unsecured debts as follows:		
Florence Audubon	\$800.00	
William H. Smith	150.00	
Lewis J. Yearger	150.00	
Sundry small debts	238.33	
		<hr/>
		1,338.83
		<hr/>
		\$4,538.33

¹ Under the early English bankruptcy laws, a claim which could properly be liquidated only by a jury was not provable though arising under a contract. *Ex parte Lingood*, 1 Atk. 240; *Baker's Case*, 2 Str. 1152; *Ex parte Charles*, 14 East, 197; *Ex parte Harding*, 5 De G. M. & G. 367; *Ex parte Todd*, 6 De G. M. & G. 744. But 32 & 33 Vict. c. 71, § 31, included all such liabilities, and it is followed by the Act now in force, 46 & 47 Vict. c. 52, § 37; and so in this country by the Act of 1867, § 19. See further, *Parker v. Hull*, 46 Ill. App. 471; *Fowles v. Treadwell*, 24 Me. 377; *Chandler v. Winship*, 6 Mass. 310; *Lothrop v. Reed*, 13 Allen, 294; *Campbell v. Perkins*, 8 N. Y. 430; *McMullin v. Bank*, 2 Pa. St. 343; *Sweatman's App.*, 150 Pa. 369.

An unliquidated claim which might have been liquidated and proved, but which was voluntarily withheld until the time for proving had expired, should be treated as a provable debt from which the bankrupt will be discharged; and if an action is brought upon the claim, he is entitled to a stay of proceedings under section 11, pending his application for a discharge. *Re Hilton*, 104 Fed. Rep. 981.

Shufeldt was, and had been for several years before filing his petition in bankruptcy, a surgeon with the rank of captain in the United States Army, on the retired list, and was in receipt of a salary of \$175 a month, his pay as such retired officer.

The debt of \$3,200 was the debt of himself and wife, secured on land in Takoma Park, Montgomery County, Maryland, conveyed by him to his wife in March, 1898, without consideration.

The debt of \$800 represented arrears of alimony, granted to his former wife, Florence Audubon, on February 25, 1898, by a decree of the Circuit Court of Montgomery County in the State of Maryland, in a cause of divorce, directing him to pay alimony to her at the rate of \$50 a month, beginning April 1, 1898. No part of that alimony has been paid.

About March 1, 1898, Shufeldt left Montgomery County, and took up his residence in the city of Washington in the District of Columbia. A suit in equity has been instituted and is still pending in the Supreme Court of the District of Columbia, to enforce the aforesaid decree for alimony, and to make him pay the alimony in arrear.

The debt of \$150 to William H. Smith was a promissory note given for taking testimony in the divorce suit under a commission from the Maryland court, and was duly assigned to John W. Hulse before the filing of the petition in bankruptcy.

The debt of \$150 to Lewis J. Yeager was for professional services rendered in the District of Columbia in the equity suit aforesaid.

The small debts for \$238.33 were contracted for supplies furnished to Shufeldt and his family before the filing of the petition in bankruptcy.

After the filing of the petition in bankruptcy, Florence Audubon filed in court her claim for \$800, being the arrears of alimony, describing it as "a debt" due by him to her; and voted thereon at the meeting of creditors for the election of a trustee. She afterwards filed a memorandum directing the withdrawal of her claim; but no order of the court to that effect was passed.

It was objected that the claim for alimony was not a provable debt under the Bankrupt Act, and should be excepted from the list of debts for which a discharge in bankruptcy might be granted. The court overruled the objection, and granted the discharge, being of opinion that the arrears of alimony which had accrued against the bankrupt up to the time of the adjudication in bankruptcy constituted a provable debt, in the sense of the Bankrupt Act of 1898; but that the discharge could not affect any instalments accruing since that adjudication. Florence Audubon appealed to this court.

By section 4 of the Bankrupt Act of July 1, 1898, c. 541, "any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." 30 Stat. 547. An officer in the army falls within this description; and it may be that he is not bound to include his pay in his schedule. *Flarty v. Odium* (1790),

3 T. R. 681; *Apthorpe v. Apthorpe* (1887), 12 Prob. Div. 192. Our bankrupt act contains no such provision as the English Bankruptcy Act, 1883, authorizing the court, when the bankrupt is an officer in the army or navy, or employed in the civil service, to order a portion of his pay to be applied for the benefit of his creditors in bankruptcy. *In re Ward* (1897), 1 Q. B. 266. But the question now before us is not whether his pay can be reached in bankruptcy, but whether he is entitled to a discharge from the arrears of alimony due to his former wife.

The Bankrupt Act of 1898 provides, in section 1, that a "discharge" means "the release of a bankrupt from all his debts which are provable in bankruptcy, except such as are excepted by this act; and includes, in section 68, among the debts which may be proved against his estate, "a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing," at the time of the petition in bankruptcy, whether then payable or not, and debts "founded upon a contract, expressed or implied." 30 Stat. 541, 563.

Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. Generally speaking, alimony may be altered by that court at any time, as the circumstances of the parties may require. The decree of a court of one State, indeed, for the present payment of a definite sum of money as alimony, is a record which is entitled to full faith and credit in another State, and may therefore be there enforced by suit. *Barber v. Barber* (1858), 21 How. 582; *Lynde v. Lynde* (1901), 181 U. S. 183. But its obligation in that respect does not affect its nature. In other respects, alimony cannot ordinarily be enforced by action at law, but only by application to the court which granted it, and subject to the discretion of that court. Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt; alimony from time to time may be regarded as a portion of his current income or earnings; and the considerations which affect either can be better weighed by the court having jurisdiction over the relation of husband and wife, than by a court of a different jurisdiction.

In the State of Maryland, and in the District of Columbia, alimony is granted by decree of a court of equity. *Wallingford v. Wallingford* (1825), 6 Har. & Johns. 485; *Crane v. Maginnis* (1829), 1 Gill & Johns. 463; *Jamison v. Jamison* (1847), 4 Maryland Ch. 289; *Tolman v. Tolman* (1893), 1 App. D. C. 299; *Tolman v. Leonard* (1895), 6 App. D. C. 224; *Alexander v. Alexander* (1898), 13 App. D. C. 334. And, as the Court of Appeals of the District of Columbia has more than once said: "The allowance of alimony is not in the nature of an absolute debt. It is not unconditional and unchangeable. It may be changed in amount, even when in arrears, upon good cause shown to the court having jurisdiction." 6 App. D. C. 233, 13 App. D. C. 352.

Under the Bankrupt Act of 1867, it was held by the District Court of the United States for the Southern District of New York, in an able opinion by Judge Choate (which is believed to be the only one on the subject under that act), that a claim for alimony, whether accrued before or after the commencement of the proceedings in bankruptcy, was not a provable debt nor barred by a discharge. *In re Lachemayer* (1878), 18 Nat. Bankr. Reg. 270; s. c. 14 Fed. Cas. 914. Like decisions have been made by Judge Brown in the same court under the present bankrupt act. *In re Shepard*, 97 Fed. Rep. 187; *In re Anderson*, 97 Fed. Rep. 321. And the same result has been reached in a careful opinion by Judge Lowell in the District Court for the District of Massachusetts. *In re Nowell*, 99 Fed. Rep. 931.

In *Menzie v. Anderson* (1879), 65 Ind. 239, the Supreme Court of Indiana held that a judgment for alimony was not a "debt growing out of or founded upon a contract, express or implied," within the meaning of a statute exempting certain property from execution for such a debt.

In *Noyes v. Hubbard* (1892), 64 Vt. 302, it was held by the Supreme Court of Vermont that a decree for alimony, not being a judgment for the enforcement of any contract, express or implied, existing between the parties thereto, but for the enforcement of a duty in the performance of which the public as well as the parties were interested, was not barred by a discharge in insolvency.

In *Romaine v. Chauncey* (1892), 129 N. Y. 566, it was held by the Court of Appeals of New York that alimony was an allowance for support and maintenance, having no other purpose, and provided for no other object; that it was awarded, not in payment of a debt, but in performance of the general duty of the husband to support the wife, made specific and measured by the decree of the court; and that a court of equity would not lend its aid to compel the appropriation of alimony to the payment of debts contracted by her before it was granted.

In *Barclay v. Barclay* (1900), 184 Ill. 375, it was adjudged by the Supreme Court of Illinois that alimony could not be regarded as a debt owing from husband to wife, which might be discharged by an order in bankruptcy, whether the alimony accrued before or after the proceedings in bankruptcy; and the court said: "The liability to pay alimony is not founded upon a contract, but is a penalty imposed for a failure to perform a duty. It is not to be enforced by an action at law in the State where the decree is entered, but is to be enforced by such proceedings as the chancellor may determine and adopt for its enforcement. It may be enforced by imprisonment for contempt, without violating the constitutional provision prohibiting imprisonment for debt. The decree for alimony may be changed from time to time by the chancellor, and there may be such circumstances as would authorize the chancellor to even change the amount to be paid by the husband, where he is in arrears in payments required under the decree. Hence such alimony cannot be regarded as a debt owing from the husband to the

wife, and, not being so, cannot be discharged by an order in the bankruptcy court."

In England, it seems to be the law that alimony is neither discharged nor provable in bankruptcy. *Linton v. Linton* (1885), 15 Q. B. D. 239; *Hawkins v. Hawkins* (1894), 1 Q. B. 25; *Watkins v. Watkins* (1896), Prob. 222; *Kerr v. Kerr* (1897), 2 Q. B. 439.

The only cases brought to our notice, which tend to support the decision below, are recent decisions of district courts, in which the authorities above cited are not referred to. *In re Houston*, 94 Fed. Rep. 119; *In re Van Orden*, 96 Fed. Rep. 86; *In re Challoner*, 98 Fed. Rep. 82.

The result is that neither the alimony in arrear at the time of the adjudication in bankruptcy, nor alimony accruing since that adjudication, was provable in bankruptcy, or barred by the discharge.¹

The order granting a discharge covering arrears of alimony is reversed, and the case remanded for further proceedings consistent with the opinion of this court.

If a fine, state not payable

IN RE MOORE.

DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY,
OCTOBER 21, 1901.

[Reported in 111 Federal Reporter, 145.]

THE following is the opinion of BAGBY, referee:

On the 13th day of September, 1900, said John W. Moore was by the grand jury of the Circuit Court of McCracken County, Kentucky, indicted for keeping and maintaining a nuisance in the nature of a disorderly house; and on the sixth day of April, 1901, he was by the verdict of a petit jury in the Circuit Court of said county found guilty of the charge in the indictment, and his fine fixed at \$400, upon which judgment was entered, and a *capias pro fine* awarded. Thereafter, on the 30th day of April, 1901, said Moore filed his petition in bankruptcy, and subsequently was adjudicated bankrupt. Afterwards the commonwealth of Kentucky filed herein its claim for amount of the judgment aforesaid.

If the claim of the commonwealth of Kentucky filed herein is a provable debt, within the contemplation of the bankrupt law, then the bankrupt will be discharged from so much of the fine adjudged against him by the State court as the bankrupt's estate is insufficient to satisfy. And it is not contended that the claim is in any sense entitled to priority. For the court to so rule, should the estate of the bankrupt be

¹ *Young v. Young* (N. Y. Supr.), 4 N. B. N. 87, *acc.*

In *Fite v. Fite* (Ky.), 4 N. B. N. 59, the court held that a judgment for future instalments of alimony was discharged, since by the law of Kentucky the husband is an ordinary debtor as to such judgments.

insufficient to pay his creditors in full, would relieve the bankrupt from the fine imposed upon him as a punishment by the State court, and to that extent would operate as a pardon of his offence. I cannot believe that such was the intention of Congress. It is a familiar rule of construction applicable to statutes that the government is not bound by a statute, unless expressly named therein. Laws are *prima facie* presumed to be made for subjects only, and the government will not be presumed to be binding itself by them unless this intention affirmatively appears. In England the crown is not reached, except by express words or by necessary implication, in any case where it would be ousted of any existing prerogative or interest. And so in the United States the States and national government are not bound by a general statutory provision whereby any of their prerogative rights, titles, or interests will be impaired, unless by express words or irresistible implication. Thus the statutes of limitation are no bar to claims by the government unless the government is included by express words. 23 Am. & Eng. Enc. Law, pp. 365-367. Section 34 of the bankrupt act of 1867 provides "that a discharge duly granted under this act shall . . . release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy, and may be pleaded, by a simple averment, that on the day of its date such discharge was granted to him, . . . as a full and complete bar to all suits brought on any such debts, claims, liabilities, or demands." Mr. Bishop, in his work on Statutory Crimes (section 103), referring to this section, says it "is of no avail against a suit by the government"; and in this connection the distinguished author quotes with approval *U. S. v. Herron*, 20 Wall. 251, 22 L. Ed. 275, wherein it is decided by the Supreme Court that debts due to the United States are not within the provisions of the bankrupt act of 1867, and are not barred by a discharge under such act, chiefly for two reasons: "(1) The United States are not named in any of the provisions of the act, except the one which provides as to all debts due the United States, and all taxes and assessments under the laws thereof. (2) That many of the provisions describing the duties, obligations, and rights of creditors, . . . if held to include the United States, could not fail to become a constant and irremediable source of public inconvenience and embarrassment." The effect of a discharge under section 17 of the present bankrupt statute has been very ably considered in the case of *In re Baker* (D. C.), 3 Am. Bankr. R. 101, 96 Fed. 963, wherein the court holds that the claim of a State is not within the provisions for the release of debts owing by the bankrupt by his discharge in bankruptcy, unless expressly made so, and declares that the legislature will not be taken to have postponed the public right to that of an individual, except in cases where such purpose has been most plainly manifest, and in support of its views cites *Johnson v. Auditor*, 78 Ky. 282, and the action of the United States Supreme Court in *U. S. v. Herron*. In reference to the last-named case the court says that the differences be-

tween the acts of 1867 and 1898 "are insufficient to indicate an express intention on the part of Congress, in the passage of the present act, to establish a different rule as to the divesting of the government, national or State, of its rights or remedies, than that which obtained under the act of 1867 as construed by the Supreme Court in *U. S. v. Herron*, *supra*. If Congress had intended that the bankrupt's discharge should operate as a release of his debts owing to the government, it would undoubtedly have so provided in unmistakable terms, especially in view of the rule of construction which has been established and so uniformly followed for so many years." Whether a discharge in bankruptcy will release a debtor from a fine came before Judge Lowell in the United States District Court at Boston. A sentence of one year's imprisonment and a fine of \$500 had been imposed on O'Donnell for complicity in the bribery of a certain alderman in Lowell. He had served his imprisonment, and contended that his discharge in bankruptcy exempted him from the payment of the fine, as that was one of the items included in his petition in bankruptcy. The commonwealth contended that the fine as well as the imprisonment was a punishment, and that by relieving him from its payment, the court would also relieve him from part of his punishment. Upon a writ of *habeas corpus* tried before Judge Lowell, the writ was refused. See 1 Nat. Bankr. N. p. 59.

The views here contended for by the referee, he believes, are sustained by nearly if not all the leading authorities on bankrupt law and procedure. A fine, penalty, or costs imposed on the bankrupt as a penalty is not usually a provable debt. Lowell, Bankr. It seems clear from subdivision 1 of section 63 that all judgments are provable, except, perhaps, such as are imposed in the nature of punishments, and which are therefore not dischargeable. Coll. Bankr. 384. Such judgments entered before commencement of proceedings in bankruptcy do, indeed, evidence a fixed liability owing at the time, but we feel confident that they are not provable. They may be within the letter of the law, but are not within the spirit of it. Under all former acts they have been considered as not provable. Id. 386. It may be safely said, therefore, that a judgment for a fine, as distinguished from a judgment on a contract, express or implied, or for damages, is not provable. Branden. Bankr. 590, 591. In the absence of specific provision to the contrary, it has been uniformly held that debts due the sovereign are not released by a discharge in bankruptcy, nor is it in any wise bound by a bankruptcy law. Id. 266. That from which the bankrupt's discharge releases him is "all his provable debts." Section 17 of the bankrupt act. And section 1, subd. 11, of the act declares that "'debt' shall include any debt, demand, or claim provable in bankruptcy." From investigation I am disposed to hold that a judgment to recover a fine imposed in the nature of a punishment is not a debt, claim, or demand contemplated by the bankrupt law. The word "debt," as defined by Mr. Blackstone, is: "A sum of money

due by certain or express agreement, as by a bond for a determined sum; a bill or note; a special bargain; or rent reserved on a lease; where the quantity is fixed and specific, and does not depend upon any subsequent valuation to settle it." Referring to this definition, Mr. Loveland, in his work on the Law and Proceedings in Bankruptcy, says: "That this is the sense in which 'debt' is used in this section is fairly to be inferred from the context. . . . If this be the meaning of 'debt' in this section, it is clear that a judgment for a fine or penalty, or a claim for alimony, or any other claim or debt not founded upon an agreement or contract, however just or lawful in itself, is not provable in bankruptcy." Loveland, Bankr. § 110. "Debt" has been held not to include a liability in tort, nor costs in a criminal case, nor a fine. 5 Am. & Eng. Enc. Law, 149-152, and notes. In the case of *Spalding v. People*, 7 Hill, 301, where a fine of \$3,000, with costs, had been imposed as a penalty for a criminal offence, the court says: "The very statement of the case is therefore enough to show that there is no color for the ground taken, viz. that the fine is a debt, within the bankrupt law. It is no more a debt than if it had been imposed after conviction on an indictment, or for any of the numerous minor offences within the calendar of crimes." In this case the debtor applied to the United States court for a writ of *habeas corpus*, and on appeal to the Supreme Court of the United States it was held that the fine was not affected by the discharge. 4 How. 21, 11 L. Ed. 858. To the same effect is *In re Sutherland*, 3 N. B. R. 314, Fed. Cas. No. 13,639,¹ where, after giving the definitions of "debt" in 3 Bl. Comm. 154, and *Gray v. Bennett*, 3 Metc. (Mass.) 522, the court said: "Looking at the act or the nature of the subject either separately or conjunctively, it appears to me that a judgment for a fine, imposed as a punishment for crime, is not a debt provable against the estate of the bankrupt." This was a decision rendered in the construction of the bankrupt act of 1841 relative to provable debts in bankruptcy, — a statute in this respect quite like the present act.

Counsel insist that the fine in this case having been reduced to judgment before the petition in bankruptcy was filed, according to the provisions of subdivision 1 of section 63, it then becomes a debt, and "a fixed liability as evidenced by a judgment, absolutely owing at the time of the filing of the petition," and therefore a provable debt; that the criminal nature of the liability is merged in the judgment, and thereby becomes a debt. I do not concur in this statement of the law. It appears to me the better opinion and weight of authority that a claim is not merged in judgment so far as to change the nature of the indebtedness out of which judgment arises. It is true, under the act of 1867 the decisions were not uniform on this point; but after a time the question was presented to the Supreme Court of the United States in the case of *Boynton v. Ball*, where the court held that the doctrine

¹ *Rex v. Norris*, 4 Burr. 2142; *Bancroft v. Mitchell*, L. R. 2 Q. B. 549; *Ex parte Graves*, 3 Ch. App. 642, acc. See B. A. 1898, § 57j.

of merger did not apply, and that the debt remained the same. See also *In re McBryde*, 8 Am. Bankr. R. 729, 99 Fed. 686; *Beers v. Hanlin* (D. C.), 99 Fed. 695; and the able opinion of Referee Hotchkiss in *Re Pinkel*, 1 Am. Bankr. R. 333; and Coll. Bankr. 384. My attention has been invited to the decision of Judge Jackson in the case of *In re Alderson* (D. C.), 98 Fed. 588, in which a contrary opinion is expressed. I regret that after a careful consideration of the questions at issue in this case, and a review of the authorities bearing on the same, I cannot reach the conclusions at which Judge Jackson has arrived.

The exceptions to the claim of the commonwealth of Kentucky filed by the trustee herein are sustained, and allowance of the claim is refused.

RE KINGSLEY.

DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS,
FEBRUARY, 1868.

[Reported in 1 Lowell, 216.]

LOWELL, J. The questions certified and argued in this case are, whether a debt which is barred by the statute of limitations of Massachusetts, where the bankrupt has resided for the last ten years, and where these proceedings are had, but not barred by the statute of limitations of Vermont, where the creditors reside, and where both parties resided when the contracts were made, can be proved against his estate in bankruptcy. If not, whether the act of the bankrupt in entering the debt upon his schedule is such an acknowledgment, or new promise, as will revive it.

To the first question, it would seem to be a sufficient reply that the statute of limitations would bar a suit in any court of law in this district, and especially in the Circuit Court of the United States. For courts of bankruptcy in disputed cases must refer such questions to the other courts, or, at least, must decide them upon the same principles as other courts would. Thus, by our statute, all such disputes may be tried, either by prosecuting to final judgment a suit already pending, or where the dispute first arises after the proceedings have been begun, by trying it according to the course of the Circuit Court in actions at law. I cannot resist the conclusion that any plea which would be good at law (this being a legal debt) must be good in bankruptcy.

But as the question has been decided otherwise by a judge from whom I differ with great hesitation (*Blatch., J., Ray's Case*, 2 Bened. 53), and has been argued here at length, I will proceed to show why, in my judgment, the same result ought to follow upon principle and authority, even if the mere fact that the defence is good at law were not, as I think it is, absolutely binding and decisive.

facts
Held - Mass
statute
governs;
no revival
can be
pleaded in
bank in another
jur. in Vt.

Statutes of limitation are remedial and beneficial. They are founded upon the sound principle that lapse of time, by obscuring the truth, renders the administration of justice uncertain, and that, for the sake of justice as well as peace, payment ought to be presumed after a certain period has passed. If the evidence of debt be of a high and formal nature, the evidence of payment may be expected to be more formally made, and preserved with more care, than in mere simple contracts; but even in such cases, some period works a bar. It is not a presumption of fact which may be rebutted by proof of non-payment, but a conclusive presumption of law. 1 Greenl. Ev. § 16. So useful and important have these statutes been found, that courts of equity, when not bound by them, have adopted them as rules of practice, and they are so regarded by the Circuit Court of the United States sitting in equity. If there were a discretion vested in the courts of bankruptcy to adopt a new rule, it seems to me they would follow this analogy.

The point was decided in this way by Lord Eldon in *Ex parte Dewdney*, 15 Ves. 479, and afterwards reheard and reviewed by the same learned judge, when he said that his first opinion was strongly confirmed, and that he had additional reasons for it. But these he does not appear to have recorded, though he intended to do so. See note A. to *Ex parte Burn*, 2 Rose, 59; *Ex parte Roffey*, 19 Ves. 468. The reasons which he has given are ample, and have been accepted in England, and his decision, though opposed to a ruling of Lord Mansfield at *nisi prius*, and to the practice of some of the ablest commissioners of bankrupts, has been acquiesced in, and has been repeatedly recognized as law, though never again directly questioned. *Ex parte Ross*, 2 Gl. & J. 46, 330; *Gregory v. Hurrill*, 5 B. & C. 341. Besides the mischiefs which the statutes of limitations were intended to remedy, and which would be aggravated by the negligence in the preservation of evidence which they are calculated to induce, and do induce, after their bar is supposed to shield a debtor from suit, all which apply as strongly in bankruptcy as in any other form of suit, there would be special hardships to bankrupts, or supposed bankrupts, as well as to their creditors, in adopting a different rule in bankruptcy from that which prevails at law. Thus an honest debtor, who makes a satisfactory and honorable composition with all his known creditors, would be liable to be prosecuted in this court as a fraudulent bankrupt for making that very composition; and this by a person who could not sue him in any court in this district, which is the only district in which proceedings in bankruptcy could be taken against him. So upon the question whether a debtor is insolvent or not, and many other points. The mischiefs would be far-reaching and intolerable.

It is said that the bankrupt law, being uniform throughout the United States, ought to be so worked as to give every creditor who could sue in any State or territory of the Union the right to proceed in bankruptcy, and therefore, although it be granted that some limitation should be applied, it must be one which would be good throughout the

Union. There is great plausibility in this argument, but it is not strong enough to overthrow the arguments on the other side. The right to sue must depend on the forum. Statutes of limitations relate only to the remedy, and cannot have an extraterritorial effect. If it were possible to have a statute of this kind, of general operation throughout the jurisdiction of the United States, it might be very useful, but there is none such. The general rule, therefore, sought to be applied, does not exist. If there were such a one, no doubt this debt would be barred by it, because it is a simple contract debt of more than ten years' standing; and such a debt is barred, I suppose, by the statutes of every State and territory, when applied to defendants who have been within their jurisdiction for that period. They do not bar suits against persons not within their jurisdiction, simply because they have nothing to do with them.

Most of them, perhaps, following the common-law rule of prescription, and for purposes of convenience, bar all suits after twenty years, and the result of holding that the law of the States and territories where this remedy is not sought shall be regarded, is simply to abolish the statutes of limitations, and revert to a common-law prescription. But the very fact that this debt is not barred by the laws of Oregon, or of any other State which has no jurisdiction of it, and because it has no jurisdiction of it, shows to my mind that the law of such a State ought not now to be applied to it. In such a matter as this, the courts of the United States must, in the absence of a law of Congress, be guided by the law of the forum. There can be no other rule.

argument | The argument most strongly pressed in this case on behalf of the creditor is, that the statute of bankruptcy intends that all debts should be discharged, wherever held; therefore, this debt must be discharged, and if so, it is a provable debt, for only provable debts are discharged.

There can be no doubt that this is a provable debt, and that it will be discharged by the certificate, if the bankrupt obtains one. All debts which by their nature are provable are discharged, whether they in fact could be proved or not. Thus debts due to an alien enemy, or to one dead or insane, or who accidentally failed to prove or was not notified, all these, and many others that could be mentioned, would be barred, though it might be impossible that they could be proved. Because this debt is provable, it does not follow that it can be proved. The question is, whether it is a debt at all. A debt that has been paid cannot be proved, but it will be discharged; that is to say, the payment need not be relied on after the certificate has been obtained. It would be a singular reply to a plea of discharge in bankruptcy, that the debt was not discharged because it could not have been proved, and that it could not be proved because it had been paid, or because the court of bankruptcy found, rightly or otherwise, that it had been paid. Yet, that is all that the rejection of this proof amounts to. Applying the law of the forum, I find, as a presumption of law, that this provable debt has been paid. All provable debts are discharged; but

answer !

all supposed debts, to which a certificate of discharge would be a bar, are not necessarily provable. The difference arises in a case like this, from the fact that the bankrupt law deals with the contract itself, and discharges it, and so, necessarily, has a much wider reach than the law of limitations, or than rules of evidence which touch only the remedy. The same thing is true in England, and would be so in our States, excepting that (by construction) the constitution of the United States forbids them to deal in this mode with contracts between citizens of different States. In England, the statutes of limitations and of bankrupts are passed by the same legislature; but one has a much wider operation than the other, so that a debt held in Scotland, or England, or the colonies, or abroad, may be discharged, though the statute of limitations may prevent its being proved. Mr. Christian, whose opinion and practice had been opposed to the rule as laid down in *Ex parte* Dewdney, gives us to understand, that the argument that the debts would necessarily be discharged, was not overlooked in the discussion of that case. The argument that Congress, by discharging debts due throughout the Union, must intend to adopt all the statutes of limitations in the Union, proves too much. The same argument will show that it must have adopted those of all the world, for debts due throughout the world are discharged in bankruptcy, if the contract were to be performed here. *Hunter v. Potts*, 4 T. R. 182; *Potter v. Brown*, 5 East, 124; *May v. Breed*, 7 Cush. 15; *Story, Conflict of Law*, § 335, &c.

The hardship of this rule is much less than might at first appear. It is only on the supposition that the creditor might possibly sue his debtor away from home that there is any hardship at all. All that the foreign creditor has to do is to sue his debtor at home, and in due season and keep his debt alive. Our statutes of limitations makes no discrimination against foreign creditors, but in some respects quite the contrary; for if he has been beyond seas, he has a longer time allowed him. If within the United States, there is no reason for any discrimination in his favor. The complaint of any creditor that he might probably find a foreign forum, which, because it is foreign, would give him a remedy which he has lost by negligence in the true and proper forum, is not entitled to much consideration. One case of practical hardship may be put, and that is when a creditor has actually sued his debtor away from home, and obtained security by attachment or otherwise, which would be taken away by the bankruptcy, and yet he would have no right to prove his debt. I consider that the bankrupt law makes a sufficient provision for such a case, by enacting that an action may be prosecuted to final judgment, and the amount of the judgment be proved in bankruptcy.¹

¹ *Re Cornwall*, 9 Blatch. 114; *Re Hardin*, 1 B. R. 395; *Re Reed*, 11 B. R. 94; *Capelle v. Trinity Church*, 11 B. R. 536; *Re Noesen*, 12 B. R. 422; *Re Doty*, 16 B. R. 202; *Re Lipman*, 94 Fed. 353, *acc.* *Re Ray*, 1 B. R. 203; *Re Shepard*, 1 B. R. 439, *contra.* See also *Re Murray*, 3 B. R. 765.

In *Nicholas v. Murray*, 18 B. R. 469, it was held that the time of limitation was to

I agree with Judge Blatchford, that the bankrupt, by putting the debt upon his schedule, does not make a new promise to pay it. This depends somewhat upon the particular statute of limitations, and it has been so decided in Massachusetts in a case under the State insolvent law, so called, which is a bankrupt law, though one limited and restrained in its operation by the constitution of the United States; and it is so upon principle, because the debtor does not make out his schedule with any view to the payment, but to the discharge of his debts. And, besides, the creditors have a right to plead the statute as well as he, and they are not bound by his schedule. *Richardson v. Thomas*, 13 Gray, 381; *Roscoe v. Hale*, 7 Gray, 274; *Stoddard v. Doane*, 7 Gray, 387; and see the cases in *Roscoe v. Hale*. In those cases, it is true, the debt was not barred when the schedules were made; but if the schedules were evidence of a new promise, two of those decisions must have been for the plaintiff, because the schedules had been made within six years before suit brought. The fact weakens the argument to this extent, that it cannot be said in this case that the debtor was merely carrying out his legal duty in putting an existing debt in his list. He would not be so bound in respect to this debt, but it remains true that he did it *diverso intuitu*.

Held - I suffered by *Proof rejected.*¹
 contemplation of bankruptcy, cannot be attached by his
 assets on ground that he had a legal defense to it,
 there being no
 fraud or concealment
 of property.

EX PARTE O'NEIL. RE JAMES L. FOWLER.

DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, JULY, 1867.

[Reported in 1 Lowell, 163.]

THE register took evidence touching the right of O'Neil to prove the amount of a judgment which he had obtained against Fowler before his bankruptcy, and ruled *pro forma* that the question whether all just credits had been given by the creditor before obtaining his judgment could not be inquired into. He certified that question to the court, and also whether interest and costs could be proved.

A. Wellington, in opposition to the proof.

R. M. Morse, Jr., for O'Neil.

LOWELL, J. Creditors, whose interests are affected by a judgment against their debtor, may avoid it collaterally, because they have no

be calculated up to the time of proof. But the prevailing doctrine is that if the statute has not run at the time as of which the bankrupt's estate is assigned, proof will not be barred. *Ex parte Ross*, 2 Glyn & J. 46, 330; *Re Eldridge*, 12 B. R. 540; *Re Graves*, 9 Fed. Rep. 816; *Re McKinney*, 15 Fed. Rep. 912; *Minot v. Thacher*, 7 Met. 435; *Willard v. Clarke*, 7 Met. 435; *Colleston v. Hailey*, 6 Gray, 517; *Parker v. Sanborn*, 7 Gray, 191. The statute continues to run, however, against any proceedings to collect a debt other than through the bankruptcy court. *Richardson v. Thomas*, 13 Gray, 381.

¹ *Re Lipman*, 94 Fed Rep. 353, acc.

right to have it reviewed directly. *Pierce v. Jackson*, 6 Mass. 244; *Downs v. Fuller*, 2 Met. 135. In bankruptcy the creditors are interested in contesting a judgment which is offered for proof in competition with their own debts; and I have no doubt they may show, by any appropriate evidence, that the judgment is void or voidable for fraud or irregularity. A debtor might suffer judgment against him for the very purpose of affecting the proceedings in bankruptcy; or a judgment may be obtained for a just debt, but under circumstances which would make it a fraudulent preference. In all such cases it must be open to other creditors to object to the judgment when offered for proof against the assets. On the other hand, where the court rendering the judgment has jurisdiction, and there has been no fraud and no preference, no one can examine into the consideration of a judgment, and show by evidence, outside of the record, that the judgment ought not to have been rendered, or not for so large a sum. While the debtor is not bankrupt nor acting in contemplation of bankruptcy he binds all the world by his acts and omissions in relation to his own affairs; and if he does not choose to defend an action to which he has a legal defence, and of which he has had full notice, his estate will be committed by his act or neglect, just as it would be by any improvident bargain he might make, or by any new promise to pay a debt barred by the lapse of time or a former discharge in bankruptcy.

When, therefore, the judgment is either void or voidable as of right by the debtor or by creditors, it may be examined into here if offered for proof; where it is valid as against the debtor, and no fraud on creditors is shown, it is valid here. If there be an intermediate case, in which it would be discretionary with the court which rendered the judgment to vacate it upon the ground of mistake, I should probably leave the assignee to pursue that remedy, postponing the proof in the meantime.

It was said in argument that the English practice goes farther than this, and permits the creditors to inquire into the consideration of all judgments. Some statements as broad as that may perhaps be found in the text-books; but I suppose the English practice, whatever it may be, is founded on the consideration that courts of equity may in many cases re-examine judgments at law, and grant new trials or restrain executions. See *Ex parte Bryant*, 1 V. & B. 211; *Ex parte Marson*, 2 Dea. 245; *Ex parte Prescott*, 1 M. D. & De G. 199.¹ If this is the reason of the practice, it should not extend beyond the limits that I have laid down; for a court of equity would certainly not stay an execution where the party had had ample opportunity of defence, and there was no fraud.

There being in this case no offer to prove fraud or irregularity, but

¹ See further *Ex parte Chatteris*, 26 L. T. n. s. 174; *Ex parte Kibble*, L. R. 10 Ch. 373; *Ex parte Banner*, 17 Ch. D. 480; *Ex parte Revell*, 13 Q. B. D. 720; *Ex parte Anderson*, 14 Q. B. D. 606; *Ex parte Lennox*, 16 Q. B. D. 315; *Re Fraser*, [1892] 2 Q. B. 633; *Re Easton*, 10 Morrell, 111; *Re Hawkins*, [1895] 1 Q. B. 404.

only an excessive assessment of damages. I must reject the evidence, and admit the proof for the full amount of the judgment.

The costs are part of the debt and can be proved, judgment having been recovered before the bankruptcy; and so can the interest, which, by a statute of Massachusetts, all judgments bear.

Debt admitted to proof.¹

Well-secured creditor can prove for whole claim, & received dividends on whole claim, tho' subject to charge for what he has realized on collateral.

SECTION II.

SECURED CLAIMS.

MERRILL v. NATIONAL BANK OF JACKSONVILLE.

SUPREME COURT OF THE UNITED STATES, OCTOBER 20, 1898-
FEBRUARY 20, 1899.

[Reported in 173 United States, 131.]

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

The inquiry on the merits is, generally speaking, whether a secured creditor of an insolvent national bank may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals, or collections made therefrom after such declaration, subject always to the proviso that dividends must cease when from them and from collaterals realized, the claim has been paid in full.

Counsel agree that four different rules have been applied in the distribution of insolvent estates, and state them as follows:—

“Rule 1. The creditor desiring to participate in the fund is required first to exhaust his security and credit the proceeds on his claim, or to credit its value upon his claim and prove for the balance, it being optional with him to surrender his security and prove for his full claim.

“Rule 2. The creditor can prove for the full amount, but shall receive dividends only on the amount due him at the time of distribution of the fund; that is, he is required to credit on his claim, as proved, all sums received from his security, and may receive dividends only on the balance due him.

“Rule 3. The creditor shall be allowed to prove for, and receive dividends upon, the amount due him at the time of proving or sending in his claim to the official liquidator, being required to credit as payments all the sums received from his security prior thereto.

“Rule 4. The creditor can prove for, and receive dividends upon,

¹ Partridge v. Dearborn, 2 Low. 286; Catlin v. Hoffman, 9 B. R. 342; Re Ulfelder Clothing Co., 3 Am. B. R. 425 (referee), acc. See also Fowler v. Dillon, 1 Hughes, 232. But Re Burns, 1 B. R. 174, McKinsey v. Harding, 4 B. R. 286, hold that a judgment can only be attacked in the court which rendered it.

the full amount of his claim, regardless of any sums received from his collateral after the transfer of the assets from the debtor in insolvency, provided that he shall not receive more than the full amount due him."

The Circuit Court and the Circuit Court of Appeals held the fourth rule applicable, and decreed accordingly.

This was in accordance with the decision of the Circuit Court of Appeals for the Sixth Circuit, in *Chemical National Bank v. Armstrong*, 16 U. S. App. 465, Mr. Justice Brown, Circuit Judges Taft and Lurton, composing the court. The opinion was delivered by Judge Taft, and discusses the question on principle with a full citation of the authorities. We concur with that court in the proposition that assets of an insolvent debtor are held under insolvency proceedings in trust for the benefit of all his creditors, and that a creditor on proof of his claim, acquires a vested interest in the trust fund; and, this being so, that the second rule before mentioned must be rejected, as it is based on the denial, in effect, of a vested interest in the trust fund, and concedes to the creditor simply a right to share in the distributions made from that fund according to the amount which may then be due him, requiring a readjustment of the basis of distribution at the time of declaring every dividend, and treating, erroneously as we think, the claim of the creditor to share in the assets of the debtor, and his debt against the debtor, as if they were one and the same thing.

The third and fourth rules concur in holding that the creditor's right to dividends is to be determined by the amount due him at the time his interest in the assets becomes vested, and is not subject to subsequent change, but they differ as to the point of time when this occurs.

In *Kellock's Case*, L. R. 3 Ch. App. 769, it was held that the creditor's interest in the general fund to be distributed vested at the date of presenting or proving his claim; and this rule has been followed in many jurisdictions where statutory provisions have been construed to require an affirmative election to become a beneficiary thereunder. For instance, the cases in Illinois construing the assignment act of that State, which are well considered and full to the point, hold that the interest of each creditor in the assigned estate "only vests in him when he signifies his assent to the assignment by filing his claim with the assignee." *Levy v. Chicago National Bank*, 158 Ill. 88; *Furness v. Union National Bank*, 147 Ill., 570.

On the other hand, the Supreme Court of Pennsylvania in *Miller's Appeal*, 35 Penn. St. 481, and many subsequent cases, has held, necessarily in view of the statutes of Pennsylvania regulating the matter, that the interest vests at the time of the transfer of the assets in trust. In that case the debtor executed a general assignment for the benefit of creditors. Subsequently the assignor became entitled to a legacy which was attached by a creditor, who realized therefrom \$2,402.87. It was held that such creditor was notwithstanding entitled to a dividend out of the assigned estate on the full amount of his claim at the time of the execution of the assignment. Mr. Justice Strong, then a member of

the State tribunal, said: "By the deed of assignment, the equitable ownership of all the assigned property passed to the creditors. They became joint proprietors, and each creditor owned such a proportional part of the whole as the debt due to him was of the aggregate of the debts. The extent of his interest was fixed by the deed of trust. It was, indeed, only equitable; but whatever it was, he took it under the deed, and it was only as a part owner that he had any standing in court when the distribution came to be made. . . . It amounts to very little to argue that Miller's recovery of the \$2,402.87 operated with precisely the same effect as if a voluntary payment had been made by the assignor after his assignment; that is, that it extinguished the debt to the amount recovered. No doubt it did, but it is not as a creditor that he is entitled to a distributive share of the trust fund. His rights are those of an owner by virtue of the deed of assignment. The amount of the debt due to him is important only so far as it determines the extent of his ownership. The reduction of that debt, therefore, after the creation of the trust, and after his ownership had become vested, it would seem, must be immaterial."

Differences in the language of voluntary assignments and of statutory provisions naturally lead to particular differences in decision, but the principle on which the third and fourth rules rest is the same. In other words, those rules hold, together with the first rule, that the creditor's right to dividends is based on the amount of his claims at the time his interest in the assets vests by the statute, or deed of trust, or rule of law, under which they are to be administered.

The first rule is commonly known as the bankruptcy rule, because enforced by the bankruptcy courts in the exercise of their peculiar jurisdiction, under the bankruptcy acts, over the property of the bankrupt, in virtue of which creditors holding mortgages or liens thereon might be required to realize on their securities, to permit them to be sold, to take them on valuation, or to surrender them altogether, as a condition of proving against the general assets.

The fourth rule is that ordinarily laid down by the chancery courts, to the effect that, as the trust created by the transfer of the assets by operation of law or otherwise, is a trust for all creditors, no creditor can equitably be compelled to surrender any other vested right he has in the assets of his debtor in order to obtain his vested right under the trust. It is true that, in equity, a creditor having a lien upon two funds may be required to exhaust one of them in aid of creditors who can only resort to the other, but this will not be done when it trenches on the rights or operates to the prejudice of the party entitled to the double fund. Story, Eq. Jur. (13th ed.) § 633; *In re Bates*, 118 Ill., 524. And it is well established that in marshalling assets, as respects creditors, no part of his security can be taken from a secured creditor until he is completely satisfied. *Leading Cases in Equity*, White & Tudor, Vol. II., Part 1, 4th Amer. ed., pp. 258, 322.

In *Greenwood v. Taylor*, 1 Russ. & Myl. 185, Sir John Leach ap-

plied the bankruptcy rule in the administration of a decedent's estate, and remarked that the rule was "not founded, as has been argued, upon the peculiar jurisdiction in bankruptcy, but rests upon the general principles of a court of equity in the administration of assets;" and referred to the doctrine requiring a creditor having two funds as security, one of which he shares with others, to resort to his sole security first. But *Greenwood v. Taylor* was in effect overruled by Lord Cottenham in *Mason v. Bogg*, 2 Myl. & Cr. 443, 488, and expressly so by the Court of Appeal in Chancery in *Kellock's case*; and the application of the bankruptcy rule rejected.

In *Kellock's Case*, Lord Justice W. Page Wood, soon afterwards Lord Chancellor Hatherly, said:—

"Now in the case of proceedings with reference to the administration of the estates of deceased persons, Lord Cottenham put the point very clearly, and said: 'A mortgagee has a double security. He has a right to proceed against both, and to make the best he can of both. Why he should be deprived of this right because the debtor dies, and dies insolvent, is not very easy to see.'

"Mr. De Gex, who argued this case very ably, says that the whole case is altered by the insolvency. But where do we find such a rule established, and on what principle can such a rule be founded, as that where a mortgagor is insolvent the contract between him and his mortgagee is to be treated as altered in a way prejudicial to the mortgagee, and that the mortgagee is bound to realize his security before proceeding with his personal demand.

"It was strongly pressed upon us, and the argument succeeded before Sir J. Leach in *Greenwood v. Taylor*, that the practice in bankruptcy furnishes a precedent which ought to be followed. But the answer to that is, that this court is not to depart from its own established practice, and vary the nature of the contract between mortgagor and mortgagee by analogy to a rule which has been adopted by a court having a peculiar jurisdiction, established for administering the property of traders unable to meet their engagements, which property that court found it proper and right to distribute in a particular manner, different from the mode in which it would have been dealt with in the Court of Chancery. . . . We are asked to alter the contract between the parties by depriving the secured creditor of one of his remedies, namely, the right of standing upon his securities until they are redeemed."

And it was the established rule in England prior to the Judicature Act, 38 and 39 Vict., c. 77, that in an administration suit a mortgagee might prove his whole debt and afterwards realize his security for the difference, and so as to creditors with security, where a company was being wound up under the Companies Act of 1862. 1 Daniel's Ch. Pr. 384; *In re Withernsea Brick Works*, L. R. 16 Ch. Div. 337.

Certainly the giving of collateral does not operate of itself as a payment or satisfaction either of the debt or any part of it, and the

debtor who has given collateral security, remains debtor, notwithstanding, to the full amount of the debt; and so in *Lewis v. United States*, 92 U. S. 618, 623, it was ruled that: "It is a settled principle of equity that a creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor."

Doubtless the title to collaterals pledged for the security of a debt vests in the pledgee so far as necessary to accomplish that purpose, but the obligation to which the collaterals are subsidiary remains the same. The creditor can sue, recover judgment, and collect from the debtor's general property, and apply the proceeds of the collateral to any balance which may remain. Insolvency proceedings shift the creditor's remedy to the interest in the assets. As between debtor and creditor, moneys received on collaterals are applicable by way of payment, but as under the equity rule the creditor's rights in the trust fund are established when the fund is created, collections subsequently made from, or payments subsequently made on, collateral, cannot operate to change the relations between the creditor and his co-creditors in respect of their rights in the fund.

As Judge Taft points out, it is because of the distinction between the right *in personam* and the right *in rem* that interest is only added up to the date of insolvency, although after the claims as allowed are paid in full, interest accruing may then be paid before distribution to stockholders.

In short, the secured creditor is not to be cut off from his right in the common fund because he has taken security which his co-creditors have not. Of course, he cannot go beyond payment, and surplus assets or so much of his dividends as are unnecessary to pay him must be applied to the benefit of the other creditors. And while the unsecured creditors are entitled to be substituted as far as possible to the rights of secured creditors, the latter are entitled to retain their securities until the indebtedness due them is extinguished.

The contractual relations between borrower and lender, pledging collaterals, remain, as is said by the New York Court of Appeals in *People v. Remington*, 121 N. Y. 328, 336, "unchanged when insolvency has brought the general estate of the debtor within the jurisdiction of a court of equity for administration and settlement." The creditor looks to the debtor to repay the money borrowed, and to the collateral to accomplish this in whole or in part, and he cannot be deprived either of what his debtor's general ability to pay may yield, or of the particular security he has taken.

We cannot concur in the view expressed by Chief Justice Parker in *Amory v. Francis*, 16 Mass. 308, 311, (1820) that "the property pledged is in fact security for no more of the debt than its value will amount to; and for all the rest the creditor relies upon the personal credit of his debtor, in the same manner he would for the whole, if no security were taken."

We think the collateral is security for the whole debt and every part

of it, and is as applicable to any balance that remains after payment from other sources as to the original amount due ; and that the assumption is unreasonable that the creditor does not rely on the responsibility of his debtor according to his promise.

The ruling in *Amory v. Francis* was disapproved, shortly after it was made, by the Supreme Court of New Hampshire, in *Moses v. Ranlet*, 2 N. H. 488, (1822) Woodbury J., afterwards Mr. Justice Woodbury of this court, delivering the opinion, and is rejected by the preponderance of decisions in this country, which sustain the conclusion that a creditor, with collateral, is not on that account to be deprived of the right to prove for his full claim against an insolvent estate. Many of the cases are referred to in *Bank v. Armstrong*, and these and others given in the *Encyclo. of Law and Eq.* 2d ed. vol. 3, p. 141.

Does the legislation in respect to the administration of national banks require the application of the bankruptcy rule? If not, we are of opinion that the equity rule was properly applied in this case.

By section 5234 of the Revised Statutes, and section 1 of the act of June 30, 1876, c. 156, 19 Stat. 63, the Comptroller of the Currency is authorized to appoint a receiver to close up the affairs of a national banking association when it has failed to redeem its circulation notes, when presented for payment ; or has been dissolved and its charter forfeited ; or has allowed a judgment to remain against it unpaid for thirty days ; or whenever the Comptroller shall have become satisfied of its insolvency after examining its affairs. Such receiver is to take possession of its effects, liquidate its assets, and pay the money derived therefrom to the Treasurer of the United States.

Section 5235 of the Revised Statutes requires the Comptroller, after appointing such receiver, to give notice by newspaper advertisement for three consecutive months, "calling on all persons who may have claims against such association to present the same, and to make legal proof thereof."

By section 5242, transfers of its property by a national banking association after the commission of an act of insolvency, or in contemplation thereof, to prevent distribution of its assets in the manner provided by the chapter of which that section forms a part, or with a view to preferring any creditor except in payment of its circulating notes, are declared to be null and void.

Section 5236 is as follows :—

"From time to time, after full provision has first been made for re-funding to the United States any deficiency in redeeming the notes of such association, the Comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated ; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or

their legal representatives, in proportion to the stock by them respectively held."

In *Cook County National Bank v. United States*, 107 U. S. 445, it was ruled that the statute furnished a complete code for the distribution of the effects of an insolvent national bank; that its provisions are not to be departed from; and that the bankrupt law does not govern distribution thereunder. The question now before us was not treated as involved and was not decided, but the case is in harmony with *Bank v. Colby*, 21 Wall. 609, and *Scott v. Armstrong*, 146 U. S. 499, which proceed on the view that all rights, legal or equitable, existing at the time of the commission of the act of insolvency which led to the appointment of the receiver, other than those created by preference forbidden by section 5242, are preserved; and that no additional right can thereafter be created, either by voluntary or involuntary proceedings. The distribution is to be "ratable" on the claims as proved or adjudicated, that is, on one rule of proportion applicable to all alike. In order to be "ratable" the claims must manifestly be estimated as of the same point of time, and that date has been adjudged to be the date of the declaration of insolvency. *White v. Knox*, 111 U. S. 784.¹

The set-off took effect as of the date of the declaration of insolvency, but outstanding collaterals are not payment, and the statute does not make their surrender a condition to the receipt by the creditor of his share in the assets.

The rule in bankruptcy went upon the principle of election; that is to say, the secured creditor "was not allowed to prove his whole debt, unless he gave up any security held by him on the estate against which he sought to prove. He might realize his security himself if he had power to do so, or he might apply to have it realized by the Court of Bankruptcy, or by some other court having competent jurisdiction, and might prove for any deficiency of the proceeds to satisfy his demand; but if he neglected to do this and proved for his whole debt, he was bound to give up his security." *Robson*, Law Bank, 336. But it was only under bankrupt laws that such election could be compelled. *Taylor v. Thompson*, 5 Pet. 358, 369.

And we are unable to accept the suggestion that compulsion under those laws was the result merely of the provision for ratable distribution, which only operated to prevent preferences, and to make all kinds of estates, both real and personal, assets for the payment of debts, and to put specialty and simple contract creditors on the same footing; and so give to all creditors the right to come upon the common fund. Equality between them was equity, but that was not inconsistent with the common law rule awarding to diligence, prior to insolvency, its appropriate reward; or with conceding the validity of prior contract rights.

We repeat that it appears to us that the secured creditor is a creditor to the full amount due him, when the insolvency is declared, just as

¹ The court here stated the cases of *White v. Knox* and *Scott v. Armstrong*.

much as the unsecured creditor is, and cannot be subjected to a different rule. And as the basis on which all creditors are to draw dividends is the amount of their claims at the time of the declaration of insolvency, it necessarily results, for the purpose of fixing that basis, that it is immaterial what collateral any particular creditor may have. The secured creditor cannot be charged with the estimated value of the collateral, or be compelled to exhaust it before enforcing his direct remedies against the debtor, or to surrender it as a condition thereto, though the receiver may redeem or be subrogated as circumstances may require.

Whatever Congress may be authorized to enact by reason of possessing the power to pass uniform laws on the subject of bankruptcies, it is very clear that it did not intend to impinge upon contracts existing between creditors and debtors, by anything prescribed in reference to the administration of the assets of insolvent national banks. Yet it is obvious that the bankruptcy rule converts what on its face gives the secured creditor an equal right with other creditors into a preference against him, and hence takes away a right which he already had. This a court of equity should never do, unless required by statute at the time the indebtedness was created.

The requirement of equality of distribution among creditors by the national banking act involves no invasion of prior contract rights of any such creditors, and ought not to be construed as having, or being intended to have, such a result.

Our conclusion is that the claims of creditors are to be determined as of the date of the declaration of insolvency, irrespective of the question whether particular creditors have security or not. When secured creditors have received payment in full, their right to dividends, and their right to retain their securities cease, but collections therefrom are not otherwise material. Insolvency gives unsecured creditors no greater rights than they had before, though through redemption or subrogation or the realization of a surplus they may be benefited.

The case was rightly decided by the Circuit Court of Appeals; its decree in No. 54 is

*Affirmed, and the decree of the Circuit Court entered July 27, 1896, in pursuance of the mandate of that court, also affirmed, and the case remanded accordingly.*¹

¹ Mr. Justice WHITE delivered a dissenting opinion, with which Justices HARLAN and McKENNA concurred. In the course of this the decisions in the State courts were collected and classified as follows:—

“As the case before us is to be controlled by the act of Congress, it would appear unnecessary to advert to State decisions construing local statutes; but inasmuch as those decisions were referred to and cited as authority, I will briefly notice them. They divide themselves into four classes: 1. Those which maintain that where ratable distribution is required, the creditor must account for his security before proving. *Amory v. Francis*, (1820) 16 Mass. 308; *Farnum v. Boutelle*, (1847) 13 Met. 159; *Vanderveer v. Conover*, (1838) 1 Harr. 487; *Bell v. Fleming's Executors*, (1858) 1 Beasley, (12 N. J. Eq.) 13, 25; *Whittaker v. Amwell National Bank*, (1894) 52 N. J. Eq. 400; *Fields v. Creditors of Wheatley*, (1853) 1 Sneed, (Tenn.) 351; *Winton v.*

Eldridge, (1859) 3 Head, (Tenn.) 361; Wurtz v. Hart, (1862) 13 Iowa, 515; Searle, Ex'or, v. Brumback, Assignee, (1862) 4 Western Law Monthly, (Ohio) 330; *In re Frasch*, (1892) 5 Wash. 344; National Union Bank v. National Mechanics Bank, (1895) 80 Maryland, 371; American National Bank v. Branch, (1896) 57 Kansas, 327; Investment Co. v. Richmond National Bank, (1897) 58 Kansas, 414. 2. Those cases which, on the contrary, decide that to allow the creditor to prove for his whole claim without deduction of security, is not incompatible with ratable distribution, and hold that the security need not be taken into account. Findlay v. Hosmer, (1817) 2 Conn. 350; Moses v. Ranlet, (1822) 2 N. H. 488; West v. Bank of Rutland, (1847) 19 Vermont, 403; Walker v. Baxter, (1854) 26 Vermont, 710, 714; In the matter of Bates, (1886) 118 Illinois, 524; Furness v. Union National Bank, (1893) 147 Illinois, 570; Levy v. Chicago National Bank, (1895) 158 Illinois, 88; Allen v. Danielson, (1887) 15 R. I., 480; Greene v. Jackson Bank, (1895) 18 R. I. 779; People v. Remington, (1890) 121 N. Y. 328; Third National Bank of Detroit v. Haug, (1890) 82 Michigan, 607; Kellogg v. Miller, (1892) 22 Oregon, 406; Winston v. Biggs, (1895) 117 N. C. 206. 3. Those cases which, whilst seemingly denying the obligation of the secured creditor to account for his security, yet, practically, work out a contrary result by requiring deduction upon collaterals as collected, and affording remedies to compel prompt realization of collaterals. *In re Estate of McCune*, (1882) 76 Missouri, 200; State v. Nebraska Savings Bank, (1894) 40 Nebraska, 342; Jamison v. Alder-Goldman Commission Co., (1894) 59 Arkansas, 548, 552; Philadelphia Warehouse Co. v. Anniston Pipe Works, (1895) 106 Alabama, 357; Erle v. Lane, (1896) 22 Colorado, 273. 4. Those which originated in purely local statutes and which hold that the secured creditor can prove for the whole amount without reference to either the bankruptcy or the chancery rule. Shunk's and Freedley's Appeals, (1845) 2 Penn. St. 304; Morris v. Olwine, (1854) 22 Penn. St. 441, 442; Keim's Appeal, (1856) 27 Penn. St. 42; Miller's Appeal, (1860) 35 Penn. St. 481; Patten's Appeal, (1863) 45 Penn. St. 151. And see a reference to the cases in Pennsylvania, in Boyer's Appeal, (1894) 163 Penn. St. 143. I supplement the compilation heretofore made by a reference to some State statutes and decisions referring to statutes which expressly provide that the claimants upon an insolvent estate can only prove for the balance due, after deduction of any security held. Indiana:—Combs v. Union Trust Co., 146 Ind. 688, 691; Kentucky:—Statutes, 1894, (Barbour & Carroll's ed.) c. 7, § 74, p. 193; Bank of Louisville v. Lockridge, 92 Kentucky, 472; Massachusetts:—Act of April 23, 1838, c. 163, § 3; General Statutes, 1860, ch. 118, § 27; Michigan:—2 How. St. § 8824, p. 2156; Minnesota:—By statute March 8, 1860, the security is made the primary fund, to which resort must be had before a personal judgment can be obtained against the debtor for a deficit, Swift v. Fletcher, 6 Minn. 550; New Hampshire:—Laws 1862, ch. 2594; South Carolina:—Piester v. Piester, 22 S. C. 139; Wheat v. Dingle, 32 S. C. 473; Texas:—Civil Stats. 1897, art. 83; Acts 1879, ch. 53, § 13; Willis v. Holland, (1896) 36 S. W. Rep. 329."

Mr. Justice GRAY also delivered a dissenting opinion, in the course of which he said:—

"The English bankrupt acts in force at the time of the Declaration of Independence, so far as they touched the distribution of a bankrupt's estate among his creditors, were the statute of 13 Eliz. (1571) c. 7, § 2, which directed the estate to be applied to the 'true satisfaction and payment of the said creditors, that is to say, to every of the said creditors a portion, rate and rate like, according to the quantity of his or their debts;' and the statute of 21 James I., (1623) c. 19, § 8 (or § 9), which made more specific provisions against allowing any creditors, whether 'having security' or not to prove 'for any more than a ratable part of their just and due debts with the other creditors of the said bankrupt.' As appears on the face of this provision, the word 'security' was evidently there used, not as including a mortgage or other instrument executed by the debtor by way of pledging part of his property as collateral security for the payment of a debt, but merely as designating a bond or writing which was evidence of the debt itself as a direct personal obligation; and the objects of the provision would appear to have been to put all debts, whether by specialty or by simple contract, upon an equal footing in the ratable distribution of a bankrupt's estate, and to permit

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the real amount only of any debt, and not any larger sum named in a bond or other speciality, to be proved in bankruptcy. 4 Statutes of the Realm, 539, 1228; 2 Cooke's Bankrupt Laws, (4th ed.) [18] [33]; 1 Ib. 119; Bac. Ab. Obligations, A; 3 Bl. Com. 439.

"Neither of those statutes contained any provision whatever for deducting the value of collateral security and proving the rest of the debt. Yet, from the earliest period of which there are any reported cases, it was uniformly held — without vouching in any provision of the bankrupt acts, other than those directing a ratable distribution among all the creditors — and had long before the American Revolution become the settled practice in the Court of Chancery, that a creditor could not retain collateral security received by him from the bankrupt and prove for his whole debt, but must have his collateral security sold and prove for the rest of the debt only. The authorities upon this point are collected in the opinion of Mr. Justice White, 173 U. S. 153.

"After the American Revolution, the provision of the statute of James I. was thrice re-enacted, with little modification. Stats. 5 Geo. IV., (1824) c. 98, § 103; 6 Geo. IV., (1825) c. 16, § 108; 12 & 13 Vict. (1849) c. 106, § 184. But the rule established by the decisions and practice of the Court of Chancery, as to the proof of secured debts, was never expressly recognized in any of the English bankrupt acts until 1869, when provisions to that effect were inserted in the statute of 32 & 33 Vict. c. 71, § 40. And there is no trace of a different rule in England, in proceedings in equity for the distribution of the estate of any insolvent debtor or corporation, until more than sixty years after the Declaration of Independence. *Amory v. Francis*, (1820) 16 Mass. 308, 311; *Greenwood v. Taylor*, (1830) 1 Russ. & Myl. 185; *Mason v. Bogg*, (1837) 2 Myl. & Cr. 443. In 1868, indeed, the Court of Chancery declined to apply the bankruptcy rule to proceedings under the winding-up acts. *Kellock's Case*, L. R. 3 Ch. 769. But Parliament, by the Judicature Acts of 1873 and 1875, applied that rule to such proceedings. Stats. 36 and 37 Vict. c. 66, § 25 (1); 38 & 39 Vict. c. 77, § 10. And Sir George Jessel, M. R., has pointed out the absurdity of having different rules in the cases of living and of dead bankrupts. *In re Hopkins*, (1881) 18 Ch. D. 370, 377.

"The first bankrupt act of the United States, enacted in 1800, was in great part copied from the earlier bankrupt acts of England, and condensed the provisions, above mentioned, of the statutes of Elizabeth and of James I., in this form: 'In the distribution of the bankrupt's effects, there shall be paid to every of the creditors a portion-rate, according to the amount of their respective debts, so that every creditor having security for his debt by judgment, statute, recognizance or specialty, or having an attachment under any of the laws of the individual States, or of the United States, on the estate of such bankrupt, (provided there be no execution executed upon any of the real or personal estate of such bankrupt, before the time he or she became bankrupt,) shall not be relieved upon any such judgment, statute, recognizance, specialty or attachment, for more than a ratable part of his debt with the other creditors of the bankrupt.' Act of April 4, 1800, c. 19, § 31; 2 Stat. 30. That provision must have received the same construction that had been given by the English judges to the statutes therein re-enacted. *Tucker v. Oxley*, (1809) 5 Cranch, 34, 42; *Scott v. Armstrong*, (1892) 146 U. S. 493, 511.

"The bankrupt act of 1841, which is well known to have been drafted by Mr. Justice Story, omitted that section, and made no specific provision whatever as to the proof of secured debts; but simply provided that 'all creditors coming in and proving their debts under such bankruptcy, in the manner hereinafter prescribed, the same being *bona fide* debts, shall be entitled to share in the bankrupt's property and effects, *pro rata*, without any priority or preference whatsoever, except only for debts due by such bankrupt to the United States, and for all debts due by him to persons who, by the laws of the United States have a preference, in consequence of having paid moneys as his sureties, which shall be first paid out of the assets.' Act of August 19, 1841, c. 9, § 5; 5 Stat. 444.

"Yet Mr. Justice Story, both in the Circuit Court and in this court, laid it down, as an undoubted rule, that a secured creditor could prove only for the rest of the debt after deducting the value of the security given him by the bankrupt himself of his own

SECTION III.

CLAIMS HAVING PRIORITY.

IN RE ROUSE, HAZARD & CO. (INCORPORATED).

CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, JANUARY 3.
1899.

[Reported in 91 Federal Reporter, 97.]

BEFORE WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge, delivered the opinion of the court.

[This was a petition to review an order of the District Court for the Northern District of Illinois, allowing priority to certain claims for labor against the bankrupt corporation. These claims had accrued within three months prior to August 31, 1898, when the bankrupt corporation made a general assignment for the benefit of creditors. The petition in bankruptcy was filed November 1, 1898. By the law of Illinois, wages for labor earned within three months prior to the making of a general assignment are given priority over other claims.]

The question here is one of construction of the bankrupt law of the United States, and is this: Whether the Congress, having spoken by a particular provision (section 64 b, cl. 4) with respect to the priority to be allowed labor claimants, and having subsequently in the same Act (section 64 b, cl. 5) spoken generally with respect to the recognition of the priorities allowed by the laws of the State of the United States, the latter general provision overrides or enlarges the prior special provision. The bankrupt act, by its terms, went into full force and effect upon its passage, July 1, 1898, and, notwithstanding the provision that no voluntary petition should be filed within one month of the passage of the Act, and that no petition for involuntary bankruptcy should be filed within four months of the passage of the Act, the bankrupt law was operative from the date of its passage, and was effective from that date to supersede the insolvency laws of the several States. *Manufacturing Co. v. Hamilton* (Mass.), 51 N. E. 529; *Blake v. Francis-Valentine Co.*, 89 Fed. 691; *In re Bruss-Ritter Co.* (E. D. Wis.), 90

property. *In re Babcock*, 3 Story, (1844) 393, 399, 400; *In re Christy*, (1845) 3 How. 293, 315.

"The omission by that eminent jurist, when framing the act of 1841, of all specific provisions on the subject as unnecessary, and his repeated judicial declarations, after he had been habitually administering that act for three or four years, recognizing that rule as still in force, compel the inference that a general enactment for the ratable distribution of the estate of an insolvent among all the creditors had the effect of preventing any individual creditor, while retaining collateral security on part of the estate, from proving for his whole debt."

Fed. 651. It is probably true that the Congress could constitutionally in the bankrupt act recognize the varying systems of the several States with respect to exemptions of property (*Darling v. Berry*, 4 McCrary, 407, 13 Fed. 659); and it may be possible that like recognition of the varying laws of the several States in regard to priority of payment of debts would not impair or destroy the uniformity of the system of bankruptcy authorized by the Constitution. We do not find occasion now to consider that subject. The question recurs, What was the real intention of the Congress as expressed in clauses 4 and 5 of section 646? In the first clause Congress addresses itself to the subject of labor claims, and particularly provides that all wages that have been earned within three months before the date of the commencement of proceedings in bankruptcy, not to exceed \$300 to each claimant, shall be awarded priority of payment. It recognized, it must be assumed, the various provisions of law in the several States with respect to this subject. It found them not to be in harmony, and in some States, as, notably, in Illinois, the laws upon that subject not to be consistent with each other. It found limitation as to time different in the different States. It found that in some of the States priority of payment was unlimited as to amount, and in some limited to so small a sum as \$50. With this divergence within its knowledge, the Congress spoke to the subject specially and particularly, and limited the amount to \$300, and as to time, to wages earned within three months before the commencement of proceedings. Can, then, the general provision of the law following immediately thereafter, allowing priority of payment for all debts owing to any person who, by the laws of the States or the United States, is entitled to priority, be held to enlarge the prior provision so that the statute should be read that, in any event, the laborer should be entitled to priority of payment in respect of wages earned within three months prior to proceedings, and in amount not exceeding \$300, and that wherever the laws of the State of the residence of the bankrupt grant the laborer priority of payment without limit as to time or amount, or impose a limit in excess of that imposed by the bankrupt act, he shall be entitled to a further priority in payment according to the law of the particular State? We think not. It is not to be supposed, unless the language of the Act clearly so speaks, that the Congress intended that in the administration of the Act there should be a marked contrariety in the priority of payment of labor claims dependent upon locality. It is an elementary principle of construction that where there are in one Act or several Acts contemporaneously passed specific provisions relating to a particular subject, they will govern in respect to that subject as against general provisions contained in the same Act.

[The court here referred to *Sutherland*, Statutory Construction, § 158; *State v. Inhabitants of Trenton*, 38 N. J. L. 67; *Taylor v. Corporation of Oldham*, 4 Ch. D. 398; *Attorney-General v. Lamplough*, 3 Ex. D. 214; *Dwarris*, Statutes, p. 658; *Felt v. Felt*, 19 Wis. 193; *State v.*

Goetze, 22 Wis. 363, 365; Hoey v. Gilroy, 129 N. Y. 138; Stockett v. Bird's Adm., 18 Md. 484.]

Our conclusion is that Congress having spoken specifically to the subject of priority of payment of labor claims, what it has said upon that subject expresses the particular intent of the lawmaking power, and that provision is not to be tolled or enlarged by any general prior or subsequent provision in that Act. That which is given in particular is not affected by general words. So that the statute providing for the priority of payment of debts referred to in clause 5 must be construed to mean other debts and different debts than those specified in clause 4. We are not unmindful of the particular hardship which our conclusion, it is said, will work out here. It arises from the fact that under the law proceedings in bankruptcy, except by voluntary act of the bankrupt, could not be commenced in time to fully protect these labor claimants. We regret that this is so. It is a misfortune arising from the provisions of the Act, but to remedy this particular wrong we cannot override a recognized canon of construction of statute law.

IN RE WESTLUND.

DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FEBRUARY 14, 1900.

[Reported in 99 Federal Reporter, 399.]

LOCHREN, District Judge. In this case creditors who were owners by assignment of claims for labor performed for the bankrupt within three months before the date of the commencement of the bankruptcy proceedings, each separate claim so assigned being less than \$300, duly filed and made proof of such claims; and the question certified by the referee for decision is whether such claims so owned are debts having priority. The answer to this question depends upon the proper construction of that clause of section 64 b of the bankruptcy act which gives priority to "wages due to workmen, clerks, or servants, which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant." This language requires that a debt for wages, to have priority, must be due to the wage-earner. If the claimant entitled to priority might be an assignee, there would be no reason why such claimant should be restricted to \$300, as he might be the owner of many small claims, each less than that amount, but aggregating more. The clause referred to is intended to favor the class whose reliance for the maintenance of themselves and families is generally upon their wages as earned. There is nothing in the nature of security or lien for the payment of the wages which could pass to an assignee. No right to priority arises or exists until the proceeding in bankruptcy is instituted.

and then the wages assigned are not "due to workmen, clerks, or servants," but to their assignees, and are outside the language of this clause. If debts for wages so assigned can be allowed priority, they may come in conflict, or at least in competition, with other claims for wages due and owing to the same workmen, clerks, or servants, earned within the same three months, and lessen the payments, if the assets will not pay in full all debts having priority. It must be held, therefore, that debts of a bankrupt for labor and services which at the commencement of the proceedings in bankruptcy are not due to the workmen, clerks, or servants, but to assignees, have no priority.

SECTION IV.

MUTUAL DEBTS AND CREDITS.

EX PARTE WAGSTAFF.

CHANCERY, AUGUST 11, 1806.

[*Reported in 13 Vesey, 65.*]

THE petition stated, that the petitioners had various dealings in trade with James and William Kershaw: the petitioners being in the habit of purchasing goods from the Kershaws, receiving remittances for their use, and accepting bills drawn on the petitioners; by means of which several dealings mutual accounts subsisted between them. On the 29th June, 1804, a Commission of Bankruptcy issued against James and William Kershaw. At that time the petitioners were in advance for money paid by them for the use of the bankrupts, exceeding the amount of their remittances, received and applied to their credit, with interest, the sum of £2,277 17s. 6d. The petitioners were also at that time under acceptance of a bill of exchange, drawn on them by the bankrupts, but not due at the date of the Commission, to the amount of £399 6s.; which bill became due, and was paid by the petitioners on the 5th of July, 1804. The petitioners were at the time of the bankruptcy indebted to the bankrupts for goods sold the sum of £360; the stipulated credit for which had not then expired; the goods having been purchased on credit, to expire on the 21st of May, 1805. The petitioners were also indebted to the bankrupts on a prior account for money had and received to their use, the sum of £3 13s. 3d.

The petitioners applied to prove under the Commission the sum of £2,277 17s. 6d.: but the Commissioners refused to admit the proof; the assignees contending, that the two sums of £360 and £3 13s. 3d. ought to be deducted; and that the amount of the bill, not being due or paid till after the bankruptcy, could not be debited in account

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consider the case for the purposes of the present decision, though it is a point upon which evidence outside of the note is of course admissible. In 1875, the petitioner lent \$1,396 to the firm of Dow, Hunt, & Co., and Cushing transferred to him eight shares of the capital stock of the Hingham Steamboat Company as collateral security, which Whiting promised to return on payment of the \$1,396 with interest. This debt was overdue and unpaid at the time of the bankruptcy. This stock is worth more than \$1,396 and interest, and the assignee has offered to pay the amount of that debt upon a reconveyance of the stock. The question is, whether Mr. Whiting can hold the surplus proceeds of the shares by way of set-off against Cushing's other debt to him, for contribution as co-surety of the note above mentioned.

I have had occasion more than once to look carefully at the cases on the subject of mutual credit in bankruptcy; and while the decisions in this country agree entirely, as far as they go, with those made in England, the subject has been more fully considered in that country, as is natural, the bankrupt law having been in force there for a much greater length of time. The leading cases on the subject are *Rose v. Hart*, 8 Taunt. 499; *Young v. Bank of Bengal*, 1 Moore, P. C. 150, much more fully reported 1 Deacon, 622; *Naoraji v. Chartered Bank of India*, L. R. 3 C. P. 444; *Astley v. Gurney*, L. R. 4 C. P. (Ex. Ch.) 714. All those cases should be studied. The result of them is, that a creditor who, at the time of the bankruptcy, has in his hands goods or chattels of the bankrupt with a power of sale, or choses in action with a power of collection, may sell those goods or collect those claims, and set them off against the debt the bankrupt owes him; and this, although the power to sell or to collect were revocable by the bankrupt before his bankruptcy; or, in other words, the occurrence of bankruptcy in such cases gives a sort of lien which did not exist before. This has been the law ever since *Rose v. Hart*, 8 Taunt. 499. Before that decision, it was admitted even in cases where there was no power of sale. *Young v. Bank of Bengal*, *ubi supra*, adds this limitation, and this only, that if the right to sell the pledge does not arise until after the bankruptcy, then there is no set-off for the surplus; for the reason that the assignee might redeem instantly before any such power existed, and the creditors shall not be prejudiced by any failure or neglect to redeem; or, to put it in another way, that the rights of the parties are fixed at the date of the bankruptcy.

I have not overlooked the fact that in *Young v. Bank of Bengal* a good deal is said about the agreement to return the surplus. In this case there is an agreement to return the shares when the debt is paid. I do not consider the case cited to stand on this ground, but on that already mentioned, that the credit did not exist at the date of the bankruptcy. See that case explained by Parke, B., one of the judges who decided it, in *Alsager v. Currie*, 12 M. & W. 751, and by the judges in the late cases above cited. I apprehend that, when shares are conveyed in this way as collateral security, the law implies a promise to

return them on the payment of the debt, and its expression cannot properly affect the case. In all the cases there has been either an express or an implied promise by the agent or other person having the property, that he would faithfully account for it and pay over its proceeds; but this does not prevent a set-off in bankruptcy. And the weight of authority is that a promise of this sort does not bar a set-off, either under the ordinary statutes or under the bankrupt act, unless the property has been intrusted to the agent for a particular purpose inconsistent with such an application of the surplus, so that this would be a fraud or breach of trust. See *Key v. Flint*, 8 Taunt. 21; *Buchanan v. Findlay*, 9 B. & C. 738, for cases of this sort; and, for the general rule, *Cornforth v. Rivett*, 2 M. & S. 510; *Eland v. Carr*, 1 East, 375; *Atkinson v. Elliott*, 7 T. R. 378.

In this case, the debt of \$1,396 was overdue and unpaid, and by a statute of Massachusetts Mr. Whiting had a right to sell the shares after giving a certain notice. This law enters into the contract of the parties; and though there is no evidence of a power of sale conferred by Mr. Cushing (the form of the transfer was not put in evidence), yet they will be taken to have understood that there would be a power of sale in accordance with the statute. On the day of the bankruptcy, Cushing was indebted to the petitioner for one-half the note of the firm actually paid by his co-surety, the petitioner, two weeks or more before that time. This makes out a case of mutual credit upon the authorities cited and the others which have followed them: a debt due from Cushing to the petitioner, and chuses in action of Cushing's, with a present power of sale in the petitioner's hands.

I understood that both parties submitted the matter to my decision, and accordingly I have decided it. It was said at the argument that the petitioner did not care to prove against Cushing's separate estate, as there could be no dividend. If so, it would not be necessary to decide the whole case now. When one partner has pledged his shares for the debt of the firm, proof may be made in full against the assets of the firm, because it is only when the proof is against the same estate which furnished the security that a sale and application of the security is required by the bankrupt law.

*Petition granted.*¹

¹ *Marks v. Barker*, 1 Wash. C. C. 178; *Catlin v. Foster*, 1 Sawy. 37; *Ex parte Caylus*, 1 Low. 550; *Re McVay*, 13 Fed. Rep. 443, *acc.* *Brown v. New Bedford Inst. for Savings*, 137 Mass. 265; *Tallman v. New Bedford Bank*, 138 Mass. 330 (*conf.* *Hathaway v. Fall River Bank*, 131 Mass. 16), *contra.* See also 1 Columbia Law Rev. 377.

LIBBY v. HOPKINS.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1881.

[Reported in 104 *United States*, 303.]

ERROR to the Supreme Court of the State of Ohio.

The suit was brought in the Superior Court of Cincinnati by A. T. Stewart & Co., of which firm the plaintiffs in error are the survivors, against Lewis C. Hopkins and wife, and Isaac M. Jordan, trustee in bankruptcy of Hopkins.

It appears from the record that A. T. Stewart & Co., merchants, of the City of New York, loaned, June 6, 1866, Hopkins, a merchant of Cincinnati, Ohio, \$100,000, and took his promissory note of that date therefor, payable on demand with interest from date, to secure the payment of which he executed and delivered to them several mortgages on real estate in Cincinnati and its vicinity. Both before and after that date he bought of them large quantities of goods, and as a matter of convenience kept with them two accounts, — one a cash and the other a merchandise account. They were his bankers. All his remittances were sent to them and credited to him in the cash account. By drafts thereon he paid his debts for merchandise to them and other New York merchants, and in order to replenish it he borrowed the \$100,000 above mentioned, and it was carried to his credit in that account. On May 4, 1867, he paid on his note \$25,000. On Nov. 12, 1867, he remitted to Stewart & Co. \$10,000; on Dec. 27, 1867, \$17,000; on the 28th of the same month, \$10,000; and on the 30th, \$48,025. He directed these remittances to be applied to the payment of his note, and to be credited thereon. It is now no longer disputed that the first three of these remittances were so applied. The last two, with the interest thereon, constitute the sum now in controversy.

On Jan. 1, 1868, Hopkins suspended business, insolvent. At that time he owed A. T. Stewart & Co. \$231,515 on account, and unsecured. His liabilities to others amounted to more than \$500,000. A petition in bankruptcy was filed against him February 29. He was adjudicated a bankrupt March 30. On April 30 Jordan was appointed trustee.

As to the foregoing facts there is no dispute.

In August, 1868, on what day the record does not show, Stewart & Co. commenced this suit for the foreclosure of the mortgages, claiming as due the full amount of the note, less the payment of \$25,000.

The answer, besides other defences not pertinent to any contention now raised, averred that Hopkins had paid on the note, not only the said sum of \$25,000, but also the remittances above mentioned, making the total amount paid thereon \$110,025; and after alleging that said payments were made in fraud of the Bankrupt Act, demanded, by way of counterclaim, a judgment against Stewart & Co. therefor.

The reply admitted that Hopkins requested Stewart & Co. to credit the remittances on his mortgage debt, and averred that they were held subject to his order, and continued to be so held, up to the time when the rights of Jordan, trustee, attached, subject to such law of offset as is provided in the Bankrupt Act. It nowhere appeared in the pleadings that Hopkins was indebted to the plaintiffs on any unsecured claim, or in any other way, except upon the note for \$100,000. No unsecured debt of Hopkins was pleaded as a set-off or otherwise.

The Superior Court found that the mortgages were valid, and the first lien on the premises therein described, and that there was due thereon, including interest, the sum of \$75,957.06. It rendered a final decree that unless that sum with interest be paid within one hundred and eighty days therefrom to Stewart & Co., the mortgaged premises should be sold.

The court further found that when Hopkins made the last two remittances, of \$10,000 and \$48,025, respectively, it was with the intent and the express instruction in writing to Stewart & Co. to apply them in discharging the mortgage claim; that Stewart & Co. refused to do so, but assumed, without his authority or consent, to apply, and did apply them to his credit on the general account against him for merchandise; that Stewart & Co. had no right to make such application; and that the remittances remained in their hands as his moneys from the several days of their payment until Feb. 29, 1868, when the title of Jordan as trustee attached thereto. It also found that the said two several sums were not subject to any claim of set-off or cross-demand, or of mutual debts or credits, on the part of Stewart & Co., under section 20 of the Bankrupt Act, or otherwise.

The court, therefore, rendered a decree in favor of Jordan, trustee, against Stewart & Co. for \$58,025, the aggregate of the last two remittances, with interest, amounting in all to \$75,981.36.

The case was carried, by the petition in error of Stewart & Co., and the cross-petition in error of Jordan, trustee, to the Supreme Court of Ohio, by which the decree of the Superior Court was affirmed.

Stewart & Co. thereupon brought the case here by writ of error. Some of the members of the firm have died, and Libby and another are its surviving members.

Mr. *Aaron F. Perry*, for the plaintiffs in error.

Mr. *Jackson A. Jordan* and Mr. *Isaac Dayton*, *contra*.

Mr. Justice Woods, after stating the facts, delivered the opinion of the court.

The only question to which our attention is directed by the plaintiffs is that of set-off under the twentieth section of the act of March 2, 1867, c. 176 (14 Stat. 517), which is as follows: "In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate: *Provided*, that

no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition." This provision was in force at the time of the trial, and is now substantially incorporated in section 5073 of the Revised Statutes.

The contention of the plaintiffs is that they were entitled under this section to set off an unsecured account due them from Hopkins against the \$58,025 remitted to them by him with directions to credit it on his mortgage debt, and which they refused so to apply.

Waiving the difficulty that they have not pleaded that account as a set-off, we shall consider the question made by them. That account is a claim provable against the bankrupt estate, and it was not purchased by or transferred to them after the filing of the petition in bankruptcy. The controversy is, therefore, reduced to this issue: Were that account and the money transmitted by Hopkins to them, and held and not applied by them to the mortgage debt, mutual credits, or mutual debts which could be set off against each other under the twentieth section of the Bankrupt Act?

The plaintiffs insist that the term "mutual credits" is more comprehensive than the term "mutual debts" in the statutes relating to set-off; that credit is synonymous with trust, and the trust or credit need not be money on both sides; that where there is a deposit of property on one side without authority to turn it into money, no debt can arise out of it; but where there are directions to turn it into money it may become a debt, the reason being that when turned into money it becomes like any other mutual debt. They say that the first of the two remittances under consideration is not proved to have been other than money, but as it was only \$10,000, its application to the note could not be required. The larger remittance was in drafts, and their application could not be required. But there was authority to turn them into money, and that to get the money on them it was necessary that the drafts should be indorsed by the plaintiffs, and that the indorsement to and collection by them put the money received in the same plight as if the drafts had been sent to them for collection. We cannot assent to these views, and they receive but little support from the adjudged cases.

Ex parte Deeze, 1 Atk. 228, arose under the twenty-eighth section of the statute 5 Geo. II. c. 30, which provides that, "when it shall appear to the said commissioners [in bankruptcy] or the major part of them, that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between the bankrupt and any other person, at any time before such person became bankrupt, the said commissioners, or the major part of them, or the assignees of such bankrupt's estate, shall state the account between them, and one debt be set against another, and what shall appear to be due on either side on the balance of said account, and on setting such debts against one another, and no more shall be claimed on either side respectively." In that case, a packer claimed to retain goods not only for the price of

packing them, but for a sum of £500 lent to the bankrupt on his note. Lord Hardwicke determined that he had such right on the ground of mutual credits, holding that the words "mutual credits" have a larger effect than "mutual debts," and that under them many cross-claims might be allowed in cases of bankruptcy, which in common cases would be rejected.

But this ruling was subsequently made narrower by Lord Hardwicke himself, in *Ex parte Ockenden*, *kd.* 235, and was in effect overruled in *Rose v. Hart*, 8 Taunt. 499. In that case trover was brought for cloths deposited by the bankrupt previously to his bankruptcy, with the defendant, a fuller, for the purpose of being dressed. It was held that the defendant was not entitled to detain them for his general balance for such work done by him for the bankrupt previously to his bankruptcy, for there was no mutual credit within that section. And the court declared that the term "mutual credits" in the act meant only such as must in their nature terminate in debts.

The rule established in this case, as to the nature of the credits which can be the subject of set-off, has been declared in other cases. *Smith v. Hodson*, 4 T. R. 211; *Easum v. Cato*, 5 Barn. & Ald. 861. The effect of the authorities is, that the term "mutual credits" includes only such where a debt may have been within the contemplation of the parties.

These authorities make it clear that, even under the Bankrupt Act of 5 Geo. II., the plaintiffs would have no right to the set-off claimed by them. And they lose sight of the controlling fact that the money and the drafts which they turned into money were remitted, with express directions to apply them on a specific debt. Without the consent of Hopkins they could never be changed into a debt due to him from the plaintiffs, and that consent has never been given.

Whether or not he had the right to direct the application is immaterial. There was no legal obstacle to the application as directed. The fact that he gave the direction imposed on the plaintiffs the obligation to apply the money as directed, or to return it to him.

They had no better right to refuse to make the application and to retain the money and set off against it the debt due to them from Hopkins, than if they had been directed to pay the money on a debt due from him to another of his creditors, or than they had to apply to the payment of his debt to them money which he left with them as a special deposit.

Hopkins sent them the money and drafts, upon the faith and trust that they would be applied according to his instructions. The refusal so to apply them did not change the relations of the parties to this fund, nor make that a debt which before such refusal was a trust. To so hold would be to permit a trustee to better his condition by a refusal to execute a trust which he had assumed. *Winslow v. Bliss*, 3 Lans. N. Y. 220, and *Scammon v. Kimball*, 92 U. S. 362, cited by the plaintiffs to support their contention, are cases where a bank or banker was

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allowed to set off the money of a depositor against a debt due from him to the bank. The answer to these authorities is that the relation between a bank and its general depositor is that of debtor and creditor. When he deposits moneys with the bank, it becomes his debtor to the amount of them. *Foley v. Hill*, 2 H. L. Cas. 28; *Bank of the Republic v. Millard*, 10 Wall. 152; *Bullard v. Randall*, 1 Gray (Mass.), 605. When, therefore, he becomes indebted to the bank, it is a case of mutual debt and mutual credit, which may well be set off against each other.

But in this case there was no deposit. The relation of banker and depositor did not arise, consequently there was no debt. When A. sends money to B., with directions to apply it to a debt due from him to B., it cannot be construed as a deposit, even though B. may be a banker. The reason is plain. The consent of A. that it shall be considered a deposit, and not a payment, is necessary and is wanting.

Another answer to the contention of the plaintiffs is found in the language of the twentieth section of the Bankrupt Act of March 2, 1867, c. 176, which differs materially from that of the twenty-eighth section of 5 Geo. II. c. 30. In our act the term "credits" and "debts" are used as correlative. What is a debt on one side is a credit on the other, so that the term "credits" can have no broader meaning than the term "debts." We find no warrant in the language of the section or its context for extending the term "credits" so as to include trusts. Generally we know that "credit" and "trust" are not synonymous terms. They have distinct and well-settled meanings, and we see no reason why they should be confounded in interpreting the twentieth section of the Bankrupt Act.

To authorize a set-off there must be mutual credits or mutual debts. The remitting of certain money assets by Hopkins to the plaintiffs, to be applied by them according to his instructions, did not make them his debtors, but his trustees. So that there were in the case no mutual credits or debts. The indebtedness was all on the side of Hopkins. The plaintiffs owed him nothing. They held his money in trust to apply it as directed by him.

They refused to make the application as he directed. They held it, therefore, subject to his order. They continued so to hold it until the rights of the trustee in bankruptcy attached, and until he sought to recover it by his counter-claim filed in this case.

The only contention of the plaintiffs set up in this court is that the Supreme Court of Ohio approved of the action of the Superior Court of Cincinnati, in refusing to allow the plaintiffs to set off the unsecured debt due to them by Hopkins against funds intrusted to them by him for an entirely different purpose. We are of opinion that the decision of the Superior Court was correct. The judgment of the Supreme Court of Ohio must, therefore, be

Affirmed.

MORGAN v. WORDELL.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, OCTOBER 22, 1900-
APRIL 1, 1901.

[Reported in 178 Massachusetts, 350.]

HOLMES, C. J. This is a suit by a trustee in bankruptcy against a debtor of the bankrupt. The debtor claims a set-off on the ground that since the bankruptcy he has paid debts due from a former partnership consisting of himself, the bankrupt, and one McGuire, from which debts the bankrupt had covenanted to save his partners harmless. It is objected that the covenant runs to the two other partners jointly, but it is sufficiently plain that there are several covenants to each. The more serious objection is that the principal debt paid is one which has been disallowed by final judgment when offered by the creditors, H. B. Claffin & Company, for proof against the estate, on the ground that they received a preference, and that a claim offered in the defendant's name in respect of the payment also has been disallowed.

As it was assumed on both sides that the provision in section 686 of the United States Bankruptcy Act concerning set-off is more than a rule of procedure, and governs in this court as well as in the courts of the United States, we shall make the same assumption for the purposes of this case, without argument. See *Hunt v. Holmes*, 16 Nat. Bankr. Reg. 101, 105; *Partridge v. Insurance Co.*, 15 Wall. 573, 580. We shall assume further, as a corollary, that if a set-off is to be maintained it must be brought within the words of the section referred to. Those words are: "A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate." These words are universal in form, and we do not see how a set-off can be claimed in this case outside of them.

If, then, the defendant claims by virtue of the rights of a quasi-surety (*Fisher v. Tift*, 127 Mass. 313, 314), who has paid and therefore is subrogated to the claim of a joint creditor of himself and the debtor (section 57*f*), the trouble is that he has to take the claim of Claffin & Company as he finds it, and he finds it a claim which is not provable against the estate, because Claffin & Company have received preferences which have not been surrendered. Section 57*g*. It seems hard that a matter between Claffin & Company and the bankrupt, with which the defendant had nothing to do, should bar rights arising out of a payment which he was compelled to make. But we do not feel at liberty to give the language of section 57*i* other than its most natural meaning, or to interpret the subrogation there provided for as a subrogation free from the disabilities attached to the creditor, or as a subrogation to the creditor's rights, independent of the effect of the preference

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upon them. One result of such an interpretation would be to allow the claim without a surrender of the preference, contrary to section 57g.¹

It is suggested that the adjudication against Clafin & Company is *res inter alios*, and there is no other evidence that they accepted a preference. But the defendant's claim by subrogation is affected by the judgment as it is by the preference, and for the same reason. He stands in the shoes of Clafin & Company, succeeds to their place, in the language of the Roman law, and is the same person with them for this purpose, a notion frequently recurring in the law. Dernasson, *de la Subrogation* (3d ed.), ch. 1, No. 7; Sheldon, *Subrogation*, § 2; 4 Massé, *Droit Commercial* (2d ed.), 60, No. 2152; D. 20, 4, 12, § 9; D. 4, 12, 16. See *Day v. Worcester, Nashua, & Rochester Railroad*, 151 Mass. 302, 307, 308.

The defendant also claims a set-off by virtue of his covenant. We assume that it has been adjudicated between the parties in the District Court that the defendant has not a claim which he could prove in his own name, and that this decision carries with it the corollary that he could not prove his claim on the covenant against the estate. If, therefore, the prohibition of a set-off of a claim "which is not provable against the estate" is to be taken with simple literalness as applying to any claim that could not be proved in the existing bankruptcy proceedings, the defendant's set-off cannot be maintained. But we are of opinion that the seemingly simple words which we have quoted must be read in the light of their history and in connection with the general provision at the beginning of section 68 for a set-off of mutual debts "or mutual credits," and that so read they interpose no obstacle to the defendant's claim. D

The provision for the set-off of mutual credits is old. St. 4 & 5 Anne, ch. 17, § 12; 5 Geo. II. ch. 30, § 28; 46 Geo. III. ch. 135, § 8; *Gibson v. Bell*, 1 Bing. N. C. 743, 753; *Ex parte Prescott*, 1 Atk. 230. It was adopted in the United States acts of 1800, ch. 19, § 42, 1841, ch. 9, § 5, and 1867, ch. 176, § 20. But while the provision as to mutual credits was thought to be more extensive than that as to mutual debts (*Atkinson v. Elliott*, 7 T. R. 378, 380), it was held that even the broader phrase did not extend to claims which, when the moment of set-off arrived, still were wholly contingent and uncertain; such, for instance, as the claim upon this covenant would have been if the defendant had not yet been called upon to pay anything upon the original partnership debt. *Abbott v. Hicks*, 5 Bing. N. C. 578; *Robson, Bankruptcy* (7th ed.), 374. But the moment when the set-off was claimed was the material moment. The defendant's claim might have been contingent at the adjudication of bankruptcy, and so not provable in the absence of special provisions such as are to be found in the later bankrupt acts in England and in the United States Act of 1867, although not in the present law; and yet if it had become liquidated, as here by payment, before the defendant was sued, he was allowed without ques-

¹ *Conf. Re Siegel-Hillman Dry Goods Co.*, 111 Fed. Rep. 980.

tion to set it off. *Smith v. Hodson*, 4 T. R. 211; *Ex parte Boyle*, *Re Shepherd*, 1 Cooke, B. L. (8th ed.) 561; *Ex parte Wagstaff*, 13 Ves. 65; *Marks v. Barker*, 1 Wash. C. C. 178, 181.

The limitations worked out by these decisions were expressed in the section of the Act of 1867 cited above, in the words "but no set-off shall be allowed of a claim in its nature not provable against the estate." These words, as it seems to us, following the cases, referred to the nature of the claim at the moment when it was sought to set it off, not to its nature at the beginning of the pending bankruptcy proceedings, and did not prevent a set-off of a claim which was liquidated at the later moment merely because, when the bankruptcy proceedings began, for some reason it did not admit of proof. The present statute leaves out the words "in its nature," but we can have no doubt that it was intended to convey the same idea as the longer phrase in the last preceding Act, from which in all probability its words were derived. "Provable" means provable in its nature at the time when the set-off is claimed not provable in the pending bankruptcy proceedings.

The right to set off the claim when liquidated after the beginning of the bankruptcy proceedings was based upon its being a mutual credit, not upon the claim being provable, which it was not until the later bankruptcy statutes. *Russell v. Bell*, 8 M. & W. 277, 281. Conversely, of course the exclusion of a set-off, when the claim still was contingent and the defendant had made no payment, did not stand on the ground that the claim was not provable in the existing bankruptcy proceedings, but on the ground that it was not provable in its nature, and that there was no machinery available to liquidate it. If we are right in supposing that the Act of 1867 meant merely to codify a principle, or rather a limitation, developed by the courts, and that the words of the present Act mean no more than those of the Act of 1867, it follows that, although the defendant's claim could not have been proved against the estate, still it is a mutual credit and may be set off when he is sued.

Judgment for defendant.

RE LANE, BRETT & CO. EX PARTE DREYFUS.

DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS,
JANUARY, 1874.

[Reported in 2 *Lowell*, 305.]

CHARLES and Jacob Dreyfus, composing the mercantile firm of Dreyfus & Co., proved a debt of \$1,047.14, against the estate of the bankrupts, at the first meeting of the creditors. Afterwards the assignee of the estate applied to the register, in the mode pointed out by General

Order, No. 34, to have the claim re-examined and disallowed. The issues and evidence were certified to the court. The claim sought to be expunged was for the contents of the promissory note of the bankrupts for \$1,519.58, and interest, less the amount of an account of about \$500 for goods bought of them by Dreyfus & Co. The assignees alleged that the note really belonged to Weil & Co., its original holders, and had been transferred to Dreyfus & Co. after the failure of the bankrupts, though before their petition was filed, in order to enable ~~Dreyfus & Co.~~ *Weil & Co. (?)* to get the full benefit of the set-off, subject to an ultimate settlement between the parties after the amount of the dividends in the bankruptcy should be ascertained. The conclusions of fact are stated in the opinion of the court.

M. Storey, for the proving creditors.

R. M. Morse, Jr., for the assignees.

LOWELL, J. The evidence in this case is of a character to satisfy me that the bare legal title to the note was transferred to Dreyfus & Co. If the indorsement were made under any definite and complete arrangement by which the purchasers were to own the note absolutely for a consideration paid down, or even for a credit to Weil & Co., if the latter were their debtors, for precisely what they received in dividends, then the set-off might be made, provided the purchase of the note was not at so late a period as to bring it within some prohibition of the statute. On this last question, that is to say, whether a purchase made after the known insolvency but before the technical bankruptcy of the debtor can be the subject of set-off, the authorities are divided; but I shall not consider it, for all that I can ascertain of the facts is that there was a legal transfer; and I feel bound to say the note was held by Dreyfus & Co. simply as trustees for Weil & Co.

Under such circumstances a set-off is not allowed, either by the general statutes of Massachusetts applying to solvent persons, or by the bankrupt law. The whole law of this matter is admirably stated in *Forster v. Wilson*, 12 M. & W. 191, in which the earlier cases are discussed. And it has been repeatedly held in this country that when a trustee is party to an action or to a proof in bankruptcy in his representative character, the only debts which can be set off on either side are those of the persons for whom he is representative, and not his own personal debts.

So here, if Weil & Co. are equitable owners of this note, Dreyfus & Co., holding the legal title, cannot use in set-off, to diminish their claim as such trustee against the bankrupts, a debt they themselves owe him for goods bought. To do this, they must have acquired the true as well as the nominal property in the note.

The true objection, then, to the proof of this debt by Dreyfus & Co., is that they have proved too little; that, instead of proving the whole note as trustees for Weil & Co., they have only proved part of it, assuming to diminish it by an inadmissible set-off. As, however, the assignees appear to fear some embarrassment in collecting the \$500

due them from Dreyfus & Co., if the proof stands in its present form, the order will be : —

Proof expunged, without prejudice to a new proof by Weil & Co., or by Dreyfus & Co. as trustees, for the full amount of the note.¹

GRAY v. ROLLO.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1873.

[Reported in 18 Wallace, 629.]

APPEAL from the Circuit Court for the Northern District of Illinois; the case being thus : —

Moses Gray filed a bill in the court below against William Rollo, assignee in bankruptcy of the estate of the Merchants' Insurance Company of Chicago, to compel a set-off of alleged mutual debts. The insurance company had become bankrupt by the great fire at Chicago, and at that time held two promissory notes for \$5,555 each made by the complainant, Gray, jointly with one Gaylord, which the company had received from the payee in the regular course of business. By the fire referred to, Moses Gray, the complainant, and his brother, Franklin Gray, doing business under the firm of Gray Brothers, suffered in the destruction of buildings, and these being insured by the said insurance company for \$30,000 on three several policies, the company became indebted to them in the sum named. The complainant alleged in his bill that his just share of liability on the two notes was one-half of the amount, and he desired to have that half extinguished by a set-off of the like amount due on the policies. The money due on the policies was confessedly not due to him alone, but to Gray Brothers. But he alleged that his brother assented to and authorized such appropriation.

The insurance company demurred, and the demurrer being sustained the court dismissed the bill. From its action herein Gray took this appeal.

Mr. J. S. Norton, for the appellant.

Mr. A. M. Pence, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

The bill being demurred to, the assent of Franklin Gray to the appropriation asked by the complainant must be taken as true; and the

¹ Bishop v. Church, 3 Atk. 691; Fair v. McIver, 16 East, 130; Belcher v. Lloyd, 10 Bing. 316; Lackington v. Combes, 6 Bing. N. C. 71; Ex parte Whitehead, 1 Gl. & J. 39; Forster v. Wilson, 12 M. & W. 191; Boyd v. Mangles, 16 M. & W. 337; De Mattos v. Saunders, L. R. 7 C. P. 570; London Bank v. Narraway, L. R. 15 Eq. 93; Re Wilson, 10 Morrell, 219; Elgood v. Harris [1896] 2 Q. B. 491; Sawyer v. Hoag, 17 Wall. 610; Scammon v. Kimball, 5 Biss. 431; Jenkins v. Armour, 14 B. R. 276, acc.

question is, whether set-off can be allowed in such a case as the one presented?

The language of the Bankrupt Act, on the subject of set-off, is: "That in all cases of mutual debts, or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid." It is clear that these claims are not mutual debts. They are not between the same parties. The notes exhibit a liability of the complainant and Gaylord; the policies, a claim of the complainant and his brother. But it is said that by the law of Illinois, all joint obligations are made joint and several; and, therefore, that the complainant is separately liable on the notes, and could be sued separately upon them. Granting this to be so, the debts would still not be mutual. If sued alone on the notes, the claim on the policies, which he might seek to set off, *pro tanto*, against the notes, is a claim due not to him alone, but to him and his brother. His brother's consent that he might use the claim for that purpose would not alter the case. Had his brother's interest been assigned to him before the bankruptcy of the company, and without any view to the advantage to be gained by the set-off, the case would be different.

Nor does the case present one of mutual credit. There was no connection between the claims whatever, except the accidental one of the complainant's being concerned in both. The insurance company, so far as appears, took the notes without any reference to the policies of insurance; and Gray Brothers insured with the company without any reference to the notes. Neither transaction was entered into in consequence of, or in reliance on, the other; and no agreement was ever made between the parties that the one claim should stand against the other. There being neither mutual debts nor mutual credits, the case does not come within the terms of the bankrupt law. If it can be maintained at all, it must be upon some general principle of equity, recognized by courts of equity in cases of set-off; which, if it exist, may be considered as applicable under an equitable construction of the act. But we can find no such principle recognized by the courts of equity in England or this country, unless in some exceptional cases which cannot be considered as establishing a general rule. In Pennsylvania, it is true, set-off is allowed in cases where the claims are not mutual, and, in that State, under the decisions there, it is probable that set-off would be allowed in such a case as this. But we do not regard the rule adopted in Pennsylvania as in accord with the general rules of equity which govern cases of set-off. We think the general rule is stated by Justice Story, in his treatise on Equity Jurisprudence, § 1437, where he says: "Courts of equity, following the law, will not allow a set-off of a joint debt against a separate debt, or conversely, of a separate debt against a joint debt; or, to state the proposition more generally, they will not allow a set-off of debts accruing in different rights. But special circumstances may occur creating an equity,

which will justify even such an interposition. Thus, for example, if a joint creditor fraudulently conducts himself in relation to the separate property of one of the debtors, and misapplies it, so that the latter is drawn in to act differently from what he would if he knew the facts, that will constitute, in a case of bankruptcy, a sufficient equity for a set-off of the separate debt created by such misapplication against the joint debt. So, if one of the joint debtors is only a surety for the other, he may, in equity, set off the separate debt due to his principal from the creditor; for in such a case the joint debt is nothing more than a security for the separate debt of the principal; and, upon equitable considerations, a creditor who has a joint security for a separate debt, cannot resort to that security without allowing what he has received on the separate account for which the other was a security. Indeed, it may be generally stated, that a joint debt may, in equity, be set off against a separate debt, where there is a clear series of transactions, establishing that there was a joint credit given on account of the separate debt." Other instances are given by way of illustration of the principle on which the court of equity will deviate from the strict rule of mutuality, allowing a set-off; all of them based on the idea that the justice of the particular case requires it, and that injustice would result from refusing it; but none of them approaching in likeness to the case before the court. There is no rule of justice or equity which requires that Gray Brothers should be paid in preference to other creditors of the insurance company, out of the specific assets represented by the notes of Gray and Gaylord. If the complainant instead of the insurance company were bankrupt, and the notes were valueless, his brother and the creditors of Gray Brothers would think it very hard if the company were allowed to pay the insurance *pro tanto* with that worthless paper.

The case of *Tucker v. Oxley*, 5 Cranch, 34, which arose out of the Bankrupt Act of 1800, has been pressed upon our attention by the counsel of the appellant, on the supposition that it is decisive in his favor. The clause relating to set-off contained in that act (2 Stat. at Large, 33, § 42) does not materially differ from the corresponding clause in the act of 1867. Mutual credits given, and mutual debts existing, before the bankruptcy, are made the ground of set-off in both acts. But the case of *Tucker v. Oxley* will be found to differ from the present. There two persons by the name of Moore, being partners, became indebted to Tucker. They afterwards dissolved partnership, and Tucker became indebted to one of them, who continued the business, and who afterwards became bankrupt. Oxley, the assignee, sued Tucker for this debt, but the latter was allowed to set off his claim against the two. The court put the decision upon the ground that the debt due from the two Moores to Tucker could have been collected from the property of either of them, and was provable under the bankruptcy proceedings against the estate of him who became bankrupt, and hence it might be set off against any claim which

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the bankrupt had against Tucker. The case, therefore, was the same as the case before us would have been if the complainant had been solely entitled to the insurance money, and if he and not the company had become bankrupt. In such case the company, according to the case of *Tucker v. Oxley*, could have set off the notes of the complainant and Gaylord against the claim for insurance. The reciprocal form of this rule would have enabled the complainant to succeed in this case had he been the sole claimant of the money due for insurance. In other words, the case of *Tucker v. Oxley* decides that a joint indebtedness may be proved and set off against the estate of either of the joint debtors who may become bankrupt, and the fact that it may be subject to be marshalled makes no difference. The joint debtors are severally liable *in solido* for the whole debt. But the case does not decide that a joint claim, that is to say, a debt due to several joint creditors can be set off against a debt due *by* one of them. If a debt is due to A. and B., how can any court compel the appropriation of it to pay the indebtedness of A. to the common debtor without committing injustice toward B.? The debtor who owes a debt to several creditors jointly cannot discharge it by setting up a claim which he has against one of those creditors, for the others have no concern with his claim and cannot be affected by it; and no more can one of several joint creditors, who is sued by the common debtor for a separate claim, set off the joint demand in discharge of his own debt, for he has no right thus to appropriate it. Equity will not allow him to pay his separate debt out of the joint fund. And if he had the assent of his co-obligees to do this, it would be unjust to the suing debtor, because he has no reciprocal right to do the same thing.

The case before us, therefore, is clearly distinguishable from that of *Tucker v. Oxley*, and the ground on which that case was put is not applicable to this.

Decree affirmed.

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CHAPTER VII.

VARIOUS DUTIES AND POWERS OF THE BANKRUPT
AND HIS TRUSTEE.

IN RE PRICE.

DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,
FEBRUARY 2, 1899.

[Reported in 91 *Federal Reporter*, 635.]

BROWN, District Judge. Certain creditors of the bankrupts not having attended at the first meeting when the bankrupts were present and ready for examination, but having afterwards been admitted to prove their claim, applied to the referee to order an examination of the bankrupts in their behalf after the bankrupts had filed their application for discharge. The referee declined to order the examination until specifications in opposition to the discharge should be filed. The question has been certified to me.

I do not find anything in the bankrupt act or the rules which limits the examination of the bankrupt to any particular time or occasion. Under subdivision 9 of section 7, it would seem that such an examination may be ordered at any time during the pendency of the proceedings. It is not unreasonable I think to allow creditors to examine the bankrupt concerning the mode of conducting his business, for the purpose of ascertaining whether there has been any such offence committed, or failure to keep books, as would furnish a just ground for refusing a discharge; and therefore I think such applications should be allowed before specifications are filed, if applied for on the return day of the notice of the debtor's application for discharge, and no prior examination of that kind has been had. *In re Mawson*, 1 N. B. R. 271, Fed. Cas. No. 9,320; *In re Seckendorf*, 1 N. B. R. 626, Fed. Cas. No. 12,600; *In re Vogel*, 5 N. B. R. 396, Fed. Cas. No. 16,984.

Section 58, however, requires that creditors shall have at least ten days' notice by mail of "all examinations of the bankrupt"; so that such an examination cannot proceed until after ten days' notice to all creditors, unless the notice of application for the bankrupt's discharge mailed to creditors contained also a notice of the bankrupt's examination. Hereafter the published and mailed notices of application for a discharge should contain a notice of examination of the debtor to avoid

the necessity of further notice to all creditors in case such an examination is allowed. Only one such examination as respects the discharge should ordinarily be had; since the statute in requiring that all creditors shall have notice of it, presumably intends that all should be equally allowed to participate in it, once for all, and not further harass the bankrupt. *In re Vogel*, 5 N. B. R. 396, 397, Fed. Cas. No. 16,984.

For the present examination, if a new notice to all creditors is required through lack of previous notice, the new notices and examination must be at the expense of the applicants; for which I allow to the referee for necessary clerical aid, as a necessary expense, considering that there are fifty creditors or upwards, \$7.50, which the applicants should deposit in advance, as well as pay the cost of clerical or stenographic aid in taking the testimony on the examination.¹

IN RE FRANKLIN SYNDICATE.

DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK,
MARCH 1, 1900.

[Reported in 101 Federal Reporter, 402.]

THE Franklin Syndicate, Incorporated, and William F. Miller having been adjudged bankrupt, and a receiver appointed by the court to take charge of their property pending the first meeting of their creditors and the selection and qualification of a trustee, one of the creditors presented a petition for the examination of the bankrupts; whereupon the following order was made by the court:—

THOMAS, District Judge. Upon reading and filing the annexed petition of Bernard O'Kane, a creditor of the aforesaid bankrupts, the proof of claim hereto annexed, and on all the papers and proceedings herein, and on motion of Belfer & Flash, his attorneys, it is ordered that the examination of the bankrupts, and of all material and necessary witnesses herein, and the taking of their testimony, as prayed for in the petition, be, and the same hereby is, referred to Augustus J. Koehler, Esq., the referee in bankruptcy herein, to take proof under the acts of Congress relating to bankruptcy, and that said examination be directed to the facts and circumstances concerning the acts, conduct, and property of said bankrupts; also concerning the cause of bankruptcy, the conducting of the bankrupts' business, the disposition of the bankrupts' property, and the bankrupts' dealings with creditors; and let subpoenas issue directing the bankrupts, and all other persons whose testimony may be material and necessary herein, to submit to

¹ See further *Re Mellen*, 97 Fed. Rep. 326.

examination before the aforesaid referee, pursuant to the rules and practice of this court, and for such other and further relief as may be just herein.

Thereafter, in pursuance of the above order, the bankrupt William F. Miller was brought before the referee for examination, and, after counsel for the receiver had been allowed to intervene in the proceeding, counsel for the bankrupt interposed an objection to any proceeding being had or taken under the order of court. This objection was based upon the ground that there was no proof that the creditor who sought the examination had procured the allowance of his claim in bankruptcy; that, if such claim had been allowed, its allowance was illegal, and not in pursuance of the bankruptcy law; that such claim could not be allowed until a first meeting of creditors was held; that the bankrupt had a right to object to the claim, and contest its validity, before it could be allowed, of which right he could not be foreclosed; that there could be no examination of the bankrupt until there had been a first meeting of creditors; that, under section 58 of the bankruptcy law, there could be no examination of the bankrupt without notice to all the creditors of at least ten days; that none of the requirements provided for by the bankruptcy law and the rules had been complied with; and that the order directing the examination of the bankrupt was wholly void, and without power, and that the referee had no jurisdiction to proceed to examine the bankrupt. The referee overruled the objection to the validity of the order, on the ground that he had no power or jurisdiction to modify, set aside, or vacate an order made by the judge of the court. Counsel for the bankrupt, and counsel representing various parties in interest, then moved for a continuance of the proceedings until a meeting of creditors should have been held, and renewed their objection to the examination of the bankrupt on the ground that the statutory notice to creditors had not been given. The referee reserved his decision on this question, and adjourned the proceedings to a future day. Exceptions to the ruling of the referee having been noted, he certified the record of the proceedings to the court for review, together with his decision on the question reserved, wherein he said:—

“An objection of a nature which warrants due consideration is made by the attorney for the bankrupt, and by Mr. Goldsmith, of counsel for certain creditors, and the receiver, and other attorneys, representing different creditors, ‘that no examination can be had, for the reason that the notice required by Bankr. Act, § 58 *a*, subd. 1, was not given.’ I do not deem the objections so made by the attorney for the bankrupt, as to the failure of such notice required by section 58 *a*, subd. 1, to be available to him; but as this objection also emanates from Mr. Goldsmith, representing a large number of creditors, as well as representing the petitioning creditors on the application to have said Miller adjudicated a bankrupt, and also Mr. Burr, and other attorneys representing different creditors, as well as by the receiver, and affects the statutory

rights of all the creditors in this proceeding, it seems to me that this objection should be considered, in view of the rights and privileges of all the creditors concerned and interested in the bankrupt's estate and property. It is my opinion, upon a careful examination of all the proceedings before me, and of the petition and order of February 16, 1900, which directs me to 'take proof under the acts of Congress relating to bankruptcy, pursuant to the rules and practice of this court,' that this objection to the examination of the bankrupt, for failure to give the notice required by section 58 *a*, subd. 1, should be sustained, and that, before proceeding with such examination, at least ten days' notice be given by mail to the creditors herein."

THOMAS, District Judge. The order for the examination of William F. Miller will be amended so as to authorize and to limit the examination solely for the purpose of preparing the schedules, and the examination will proceed without notice to creditors.

IN RE FELDSTEIN.

DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,
JULY 17, 1900.

[*Reported in 103 Federal Reporter, 269.*]

BROWN, District Judge. Application is made for an order to commit the witness A. C. Maynard for contempt in refusing to answer certain questions put to him in an examination at the instance of the receiver of the bankrupt, pending before the referee, which questions the witness refused to answer on the ground that his answer would or might tend to criminate him.

The subjects of inquiry were some thirty-five checks, amounting altogether to \$72,486.53, which had been given by the bankrupt to the witness between September 19, 1898, and August 10, 1899. The object of the examination was to ascertain the consideration for those checks, and in fact to ascertain whether they were not given for gambling debts which the trustee might recover by action against the witness. Two actions of that kind on various other checks had already been brought by the bankrupt's receiver in the State court, and are still pending there.

By the Penal Code of the State of New York, gambling is a criminal offence. Section 340 provides that any person exacting or receiving anything from another won by any game of chance, shall forfeit five times the value thereof; section 341 provides that a person who wins or loses at play by betting at any time the sum of \$25 or upward, within twenty-four hours, is punishable by a fine of five times the value of sum so lost or won. Various other sections make it penal to keep a

room or building to use for gambling purposes, or tables, apparatus, or other implements for such purposes.

The witness had stated in general that the checks referred to were given to him in payment of moneys loaned to the bankrupt at the times mentioned in the checks; or rather that each check was given the next time he saw the bankrupt after the loan. Numerous other questions were asked, some of which were answered, the purpose of which evidently was to show that the checks were really given to pay gambling debts, and that the so-called loans by the witness were a device to conceal that fact. Among the questions which the witness declined to answer were: Whether he slept at any other place than his ordinary place of abode; whether he had played cards with the bankrupt; whether he had seen the bankrupt playing roulette during the time which was covered by the checks; why his answer to such questions might tend to criminate him; whether during this period he was interested in an establishment where roulette was played; whether he had seen the bankrupt in certain premises named; whether any of the checks referred to were given to the witness at that place; whether all the checks were not given to him by the bankrupt for losses incurred by him in games of chance at the establishment conducted by the witness, or in which the witness was interested; whether the witness had any business at this period other than the carriage business in which he had stated he was interested; whether he had ever seen the bankrupt use any of the money loaned to him by the witness for any purpose; whether the greater part of the money was not used in settling up losses which the bankrupt had incurred in a gaming establishment in which the witness was interested, and the checks given on each occasion of a loss; whether the bankrupt had won any money of the witness during the same period; whether during this period the witness resided temporarily or otherwise at the place indicated; whether the bankrupt was not in the habit of continually during that period visiting the premises and gambling there with the witness.

It is evident from these questions that the object of the examination was to require the witness to furnish evidence which would enable the receiver to recover back money of the bankrupt lost in gambling and paid by him to the witness. Under the Penal Code of this State such acts are made punishable as offences. The witness is therefore protected not only by the constitution of the State, but also by the United States Constitution, from any compulsory answers to such inquiries, unless perfect statutory immunity is afforded to the witness in answering such questions. Section 7a (9) of the present bankrupt act provides as respect the bankrupt himself, that "no testimony given by him shall be offered in evidence against him in any criminal proceeding." This provision, even if applicable in favor of a witness (which it is not in terms), seems to be no stronger or more effective as a protection than section 860 of the Revised Statutes, which in *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, was on full discussion

held insufficient. This was followed in *People v. Forbes*, 143 N. Y. 219, 38 N. E. 303, and reiterated in *Brown v. Walker*, 161 U. S. 591, 16 Sup. St. 644, 40 L. Ed. 819. The same ruling upon clauses of this character has been made in several bankruptcy cases. *In re Hathorn*, 2 Am. Bankr. R. 298; *In re Rosser*, 2 Am. Bankr. R. 755, 96 Fed. 305; *In re Scott*, 1 Am. Bankr. 49, 95 Fed. 815. Section 342 of the New York Penal Code and section 10 of the Code of Criminal Procedure, are no broader in their provisions than those above referred to, and are consequently insufficient to afford the complete immunity required by the Constitution. In the case of *Brown v. Walker*, however, the statutory exemption had been extended by amendment so as to afford complete immunity from prosecution in respect to the subjects of the witness's testimony; and on the ground of that extension alone the statutory immunity of the witness was held to be complete, and he was accordingly held bound to answer.

By a recent similar amendment in the law of the State of New York, applicable to the examination of witnesses in certain proceedings to prevent monopolies, etc. (Laws 1899, c. 609, § 6), complete immunity from prosecution is similarly afforded; and on that ground it was recently decided by Chester, J., in the Ice Cases, so-called (*Morse v. Nussbaum*, 32 Misc. Rep. 1, 66 N. Y. Supp. 129), that the witness must answer.

There is no general provision, however, in the laws of the State of New York or in the statutes of the United States which furnishes immunity from prosecution to a witness interrogated in respect to his participation in gambling or moneys thereby acquired. At most the exclusion extends only to the particular evidence given by the witness, and this being held to be insufficient according to the authorities above cited, the witness must be held privileged from testifying to the matters certified.¹

¹ The Circuit Court of Appeals for the Ninth Circuit reached a contrary conclusion in *Mackel v. Rochester*, 102 Fed. Rep. 314, but neither *Counselman v. Hitchcock*, 142 U. S. 547, nor the decisions of district courts cited in *Re Feldstein* were referred to. The court assumed that if the bankrupt in answering incriminating questions "exposes himself to prosecution and penalty, he is within the protection of the statute, and upon any such prosecution is authorized to plead as a bar thereof that under the compulsion of this section he gave the incriminating testimony." The court, therefore, relied on *Brown v. Walker*, 161 U. S. 591, and held the witness must answer. It seems obvious, however, in view of the decision of *Counselman v. Hitchcock*, that the assumption of the court is unwarranted.

IN RE PITTELKOW.

DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN,
APRIL 6, 1899.

[Reported in 92 Federal Reporter, 901.]

ON petition by the trustee for an order restraining the commencement of foreclosures by mortgagees, and for authority to sell the various parcels of real estate free of incumbrances, preserving the rights of all lien claimants against the proceeds.

The petition states the appraised value of the real estate, comprising numerous parcels, at \$107,000, and the aggregate amount of mortgages at about \$80,000; that there are thirty-nine separate mortgages, and immediate foreclosure suits are threatened, of which the expense would aggregate several thousand dollars; that the claims of unsecured creditors amount to about \$60,000, and a sale subject to the mortgages and foreclosure proceedings would yield little or nothing for the general estate. An order being entered thereupon citing the mortgagees to show cause why relief should not be granted as prayed for, objections to the jurisdiction were raised by sundry mortgagees, for whom special appearance was made for the purpose, but the matter was submitted generally on behalf of others.

Bloodgood, Kemper, & Bloodgood, for trustee.

N. Pereles & Sons, Moritz Wittig, Jr., Sheridan & Wollaeger, and others, for mortgagees.

SEAMAN, District Judge. Upon the general question of jurisdiction, I am of opinion that the District Court is vested with exclusive jurisdiction over the property of the bankrupt, and with sufficient equity powers to have all claims by mortgagees brought in and administered; that sales may be authorized, under proper circumstances, free and clear from the mortgages, or other liens, by preserving and transferring the claims to the fund thus provided; and that the commencement of foreclosure proceedings can be restrained to that end. The decisions under the bankrupt acts of 1841 and 1867 clearly sustain each of these propositions. In the Supreme Court, the cases of *In re Christy*, 3 How. 292, *Nugent v. Boyd*, 3 How. 426, and *Houston v. Bank*, 6 How. 486, established the doctrine in reference to the Act of 1841; and under the Act of 1867 the same view was declared in *Ray v. Norseworthy*, 23 Wall. 128, and in *Insurance Co. v. Murphy*, 111 U. S. 738, 4 Sup. Ct. 679. The decisions in the circuit and district courts under the latter Act were uniform in the same line, and the following are sufficient citations: *In re Kirtland*, 10 Blatchf. 515, Fed. Cas. No. 7,851; *Sutherland v. Iron Co.*, 9 N. B. R. 298, Fed. Cas. No. 13,643; *In re Sacchi*, 10 Blatchf. 29, Fed. Cas. No. 12,200; *In re Brinkman*, 7 N. B. R. 421,

Fed. Cas. No. 1884; *In re Kahley*, 2 Biss. 383, Fed. Cas. No. 7,598; *Foster v. Ames*, 1 Low. 313, Fed. Cas. No. 4,965; *In re Mead*, 58 Fed. 312. The Act of 1898 equally establishes paramount jurisdiction in its general provisions as a national bankruptcy enactment. Its interpretation in that view by this court in *Re Bruss-Ritter Co.*, 90 Fed. 651, has support in an unbroken current of recent decisions in circuit courts of appeals and in the district courts. The provisions conferring equity powers and jurisdiction over mortgagees and all classes of lien claimants, and over sales by trustees, are at least as clear as the corresponding provisions of the former Acts upon which the doctrine was established as above referred to. Whatever may be the construction placed upon definitions of jurisdiction contained in section 23, I am of opinion that the section is not applicable, in any view, to mortgages of real estate, where possession of the *res* is vested in the Bankruptcy Court, and is held in fact by the trustee; the distinctions being well stated by Judge Baker in *Re Goodykoontz* (*Carter v. Hobbs*, 92 Fed. 594), in opinion of March 10, 1899. In section 57 jurisdiction over such claimants is clearly conferred, is necessarily complete; and, in accord with the uniform rule in such cases, there can be no interference with the possession, and no foreclosure proceedings, where the trustee is an indispensable party, except upon leave of the Bankruptcy Court. See cases cited *supra*. It is, however, the duty of the court to consider the interests of mortgagees and other secured creditors as well as those of the general creditors; and unless it is apparent (1) that the mortgaged premises in the given case will probably realize upon a sale an amount substantially in excess of the mortgage, and (2) that there are no complications, by dower rights, conveyances, or other conditions, which require foreclosure under the mortgage, the power to proceed summarily by sale, including the interest of the mortgagee, should not be exercised. *In re Taliafero*, 3 Hughes, 422, Fed. Cas. No. 13,736; *In re Kahley*, 2 Biss. 383; *Foster v. Ames*, 1 Low. 313, Fed. Cas. No. 4,965. Certainly if foreclosure is necessary to bar rights which cannot be brought before the court in the bankruptcy proceeding, the mortgagee should have leave to that end, on proper showing of cause, otherwise he would be compelled to bid for the protection of his mortgage interest, without the benefits of complete foreclosure. On the other hand, in a simple case in which the mortgagee and the owner of the equity are before the court, or may be brought in, a sale by order of the Bankruptcy Court, with provision saving the rights of the mortgagee to bid up to the ascertained amount of his mortgage without advancing the money, except for expenses, would be beneficial to all parties and effective. No sale can be made which affects the rights of mortgagees or other lienholders without notice to them, and "due opportunity to defend their interests." *Ray v. Norseworthy*, 23 Wall. 128, 135; *Insurance Co. v. Murphy*, 111 U. S. 738, 742, 4 Sup. 679. The power to order a sale free of incumbrances ought not to be exercised in any instance unless the court is "accurately informed as to the

facts," and all parties in interest have full opportunity to be heard, and the respective interests are ascertained. *In re Taliafero*, 3 Hughes, 422, Fed. Cas. No. 13,736, opinion by the chief justice; *In re Sacchi*, 10 Blatchf. 29, Fed. Cas. No. 12,200, on review by Woodruff, C. J.

My conclusions are:—

1. That jurisdiction exists to restrain mortgagees, for a reasonable time, from commencing foreclosure proceedings, and to order sales free from incumbrances, in special instances, after due hearing, where the rights are clear.

2. That sufficient facts appear to enjoin all the mortgagees or lien claimants who were duly cited herein from instituting foreclosure proceedings until the further order of the court, but with leave to any mortgagee or lien claimant to present his petition before the referee to be heard respecting any alleged necessity for immediate foreclosure or of unreasonable delay on the part of the trustee, for report to the court whether the petitioner or petitioners should be exempted from the order.

3. That no general order for sale of real estate by the trustee, free from incumbrance, can be entered on the facts stated; and sufficient information does not appear to order such sale in any special instance.

4. That the petition of the trustee, and all matters relating to sales of the real estate, either subject to or free from incumbrances, and of claims by mortgagees or other lienholders, be referred to the referee, to be heard upon petitions and answers, and notice to all parties in interest as the referee may prescribe, consistently with the general orders, and reported to the court with his recommendations.

5. That sales be made, without unnecessary delay, of all the interest of the bankrupt in real estate not liable to sale under special order as above indicated.

Let orders enter accordingly.¹

¹ To the cases cited by the court, the following in accord with them may be added: *Re McClellan*, 1 B. R. 389; *Re Barrow*, 1 B. R. 481; *Re Columbian Metal Works*, 3 B. R. 75; *Re Etheridge Furniture Co.*, 92 Fed. Rep. 329; *Re Worland*, 92 Fed. Rep. 893; *Southern Loan & Trust Co. v. Benbow*, 96 Fed. Rep. 514; *Re Sanborn*, 96 Fed. Rep. 551; *Re Matthews*, 109 Fed. Rep. 603. *Conf. Re Styer*, 98 Fed. Rep. 290.

In England the Bankruptcy Court does not exercise this power. *Ex parte Rumboll*, 6 Ch. App. 842; *Ex parte Pannell*, 6 Ch. D. 335; *Ex parte Fletcher*, 10 Ch. D. 610; *Ex parte Hirst*, 11 Ch. D. 278.

In the absence of special order by the Bankruptcy Court, a mortgagee or pledgee may enforce his rights against the trustee in bankruptcy in the same way as against the original debtor. *Yeatman v. Savings Institution*, 95 U. S. 764; *Re Porter*, 109 Fed. Rep. 111; *Harvey v. Smith*, 61 N. E. Rep. 217 (Mass.). *Conf. Re Cobb*, 96 Fed. Rep. 821.

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BARDES v. HAWARDEN BANK.

SUPREME COURT OF THE UNITED STATES, JANUARY 31-
MAY 28, 1900.

[Reported in 178 United States, 524.]

omit
MR. JUSTICE GRAY delivered the opinion of the court.

. . . THE present appeal from the final decree of the District Court, dismissing the bill for want of jurisdiction, distinctly presents for the decision of this court the question whether, under the act of 1898, a District Court of the United States, in which proceedings in bankruptcy have been commenced and are pending under the act, has jurisdiction to entertain a suit by the trustee in bankruptcy against a person holding, and claiming as his own, property alleged to have been conveyed to him by the bankrupt in fraud of creditors. This is a question of general importance, upon which there has been much difference of opinion in the lower courts of the United States.

Its determination depends mainly on the true construction of two sections of the Bankrupt Act of 1898. [The court here set forth sections 2 and 23 of the act of 1898, and for purposes of comparison, sections 1 and 2 of the act of 1867.]

In *Lathrop v. Drake*, (1875) 91 U. S. 516, the jurisdiction conferred on the district courts and the circuit courts of the United States by the Bankrupt Act of 1867 was defined by this court, speaking by Mr. Justice Bradley, as consisting of "two distinct classes: first, jurisdiction, as a court of bankruptcy, over the proceedings in bankruptcy, initiated by the petition, and ending in the distribution of assets amongst the creditors, and the discharge or refusal of a discharge of the bankrupt; secondly, jurisdiction, as an ordinary court, of suits at law or in equity, brought by or against the assignee in reference to alleged property of the bankrupt, or to claims alleged to be due from or to him." And the jurisdiction of the district and circuit courts over suits to recover assets of the bankrupt from a stranger to the proceedings in bankruptcy, brought by the assignee in a district other than that in which the decree in bankruptcy had been made, was upheld, not under the provisions of section 1 of that act, giving to the District Court original jurisdiction of proceedings in bankruptcy, and of section 2, giving to the Circuit Court supervisory jurisdiction over such proceedings; but wholly under the distinct clause of section 2, which gave to those two courts concurrent jurisdiction of all suits, at law or in equity, brought "by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee."

In an earlier case, it had been observed by Mr. Justice Clifford, delivering a judgment of this court dismissing an appeal from a decree of

the Circuit Court in the exercise of its supervisory jurisdiction in bankruptcy, that the jurisdiction conferred by the later clause was "other and different from the special jurisdiction and superintendence described in the first clause of the section ;" was "of the same character as that conferred upon the circuit courts by the eleventh section of the Judiciary Act" of 1789, and was "the regular jurisdiction between party and party, as described in the Judiciary Act and the third article of the Constitution." *Morgan v. Thornhill*, (1870) 11 Wall. 65, 76, 80.

It was also repeatedly held by this court that the right of an assignee in bankruptcy to assert a title in property transferred by the bankrupt before the bankruptcy to a third person, who now claimed it adversely to the assignee, could only be enforced by a plenary suit, at law or in equity, under the second section of the act of 1867 ; and not by summary proceedings under the first section thereof, notwithstanding the declaration in that section that the jurisdiction in bankruptcy should extend "to the collection of all the assets of the bankrupt," and "to all acts, matters, and things to be done under and in virtue of the bankruptcy" until the close of the proceedings in bankruptcy. *Smith v. Mason*, (1871) 14 Wall. 419 ; *Marshall v. Knox*, (1872) 16 Wall. 551, 557 ; *Eyster v. Gaff*, (1875) 91 U. S. 521, 525.

The jurisdiction of the courts of the United States over all matters and proceedings in bankruptcy, as distinguished from independent suits at law or in equity, was of course exclusive. But it was well settled that the jurisdiction of such suits, conferred by the second section of the act of 1867 upon the circuit and district courts of the United States for the benefit of an assignee in bankruptcy, was concurrent with that of the State courts. In *Eyster v. Gaff*, just cited, this court, speaking by Mr. Justice Miller, said : "The opinion seems to have been quite prevalent in many quarters at one time, that, the moment a man is declared bankrupt, the District Court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the circuit courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance ; and it was a prevalent practice to bring any person, who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view. The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has for certain classes of actions conferred a jurisdiction for the benefit of the assignee in the circuit and district courts of the United States, it is concurrent with and does not divest that of the state courts."

Under the act of 1867, then, the distinction between proceedings in bankruptcy, properly so called, and independent suits, at law or in equity, between the assignee in bankruptcy and an adverse claimant, was distinctly recognized and emphatically declared. Jurisdiction of such suits was conferred upon the district courts and circuit courts of the United States by the express provision to that effect in section 2 of that act, and was not derived from the other provisions of sections 1 and 2, conferring jurisdiction of proceedings in bankruptcy. And the jurisdiction of suits between assignees and adverse claimants, so conferred on the circuit and district courts of the United States, did not divest or impair the jurisdiction of the State courts over like cases.

The decisions of this court under the earlier bankrupt act of August 19, 1841, c. 9, are very few in number, and afford little aid in the decision of the present case. The one most often cited in favor of maintaining such a suit as this under the existing law is *Ex parte Christy*, (1845) 8 How. 292. But section 8 of the act of 1841 contained the provision (afterwards embodied in section 2 of the act of 1867, and above quoted), conferring on the circuit courts concurrent jurisdiction with the district courts of suits, at law or in equity, between assignees in bankruptcy and adverse claimants of property of the bankrupt. 5 Stat. 446. And Mr. Justice Story in *Christy's* case considerably relied on that provision. 8 How. 314. Moreover, the only point necessary to the decision of that case was that this court had no power to issue a writ of prohibition to the District Court sitting in bankruptcy; much of Mr. Justice Story's opinion in favor of extending the jurisdiction of that court at the expense of the State courts is contrary to the subsequent adjudication of this court in *Peck v. Jenness*, (1849) 7 How. 612; and in a still later case this court, speaking by Mr. Justice Curtis, said that the two former cases "are an illustration of the rule that any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression." *Carroll v. Carroll*, (1853) 16 How. 275, 287.

We now recur to the provisions of the act of 1898. This act has the somewhat unusual feature of inserting at the head of each section a separate title indicating the subject-matter.

Section 2 of this act is entitled "Creation of Courts of Bankruptcy and their Jurisdiction," takes the place of section 1 of the act of 1867, and hardly differs from that section, except in the following particulars:—

First. It begins by describing the jurisdiction conferred on "the courts of bankruptcy" as "such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings;" and it ends by declaring that "nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

Second. It specifies in greater detail matters which are, in the strictest sense, proceedings in bankruptcy.

Third. It includes, among the powers specifically conferred on the courts of bankruptcy, those to “(4) arraign, try, and punish bankrupts, officers, and other persons, and the agents, officers, members of the board of directors or trustees, or other similar controlling bodies of corporations, for violations of this act, in accordance with the laws of procedure of the United States now in force, or such as may be hereafter enacted, regulating trials for the alleged violation of laws of the United States;” “(6) bring in and substitute additional persons or parties in proceedings in bankruptcy, when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;” and “(15) make such orders, issue such process, and enter such judgments, in addition to those specially provided for, as may be necessary for the enforcement of the provisions of this act.”

The general provisions at the beginning and end of this section mention “courts of bankruptcy” and “bankruptcy proceedings.”

Proceedings in bankruptcy generally are in the nature of proceedings in equity; and the words “at law,” in the opening sentence conferring on the courts of bankruptcy “such jurisdiction, at law and in equity, as will enable them to exercise original jurisdiction in bankruptcy proceedings,” may have been inserted to meet clause 4, authorizing the trial and punishment of offences, the jurisdiction over which must necessarily be at law and not in equity.

The section nowhere mentions civil actions at law, or plenary suits in equity. And no intention to vest the courts of bankruptcy with jurisdiction to entertain such actions and suits can reasonably be inferred from the grant of the incidental powers, in clause 6, to bring in and substitute additional parties “in proceedings in bankruptcy,” and, in clause 15, to make orders, issue process and enter judgments, “necessary for the enforcement of the provisions of this act.”

The chief reliance of the appellant is upon clause 7. But this clause, in so far as it speaks of the collection, conversion into money, and distribution of the bankrupt's estate, is no broader than the corresponding provisions of section 1 of the act of 1867; and in that respect, as well as in respect to the further provision authorizing the court of bankruptcy to “determine controversies in relation thereto,” it is controlled and limited by the concluding words of the clause, “except as herein otherwise provided.”

These words “herein otherwise provided” evidently refer to section 23 of the act, the general scope and object of which, as indicated by its title, are to define the “Jurisdiction of United States and State courts” in the premises. The first and second clauses are the only ones relating to civil actions and suits at law or in equity.

The first clause provides that “the United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy,” (thus clearly recognizing

the essential difference between proceedings in bankruptcy, on the one hand, and suits at law or in equity, on the other,) "between trustees as such and adverse claimants, concerning the property acquired or claimed by the trustees," restricting that jurisdiction, however, by the further words, "in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants." This clause, while relating to the circuit courts only, and not to the district courts of the United States, indicates the intention of Congress that the ascertainment, as between the trustee in bankruptcy and a stranger to the bankruptcy proceedings, of the question whether certain property claimed by the trustee does or does not form part of the estate to be administered in bankruptcy, shall not be brought within the jurisdiction of the national courts solely because the rights of the bankrupt and of his creditors have been transferred to the trustee in bankruptcy.

But the second clause applies both to the district courts and to the circuit courts of the United States, as well as to the State courts. This appears, not only by the clear words of the title of the section, but also by the use, in this clause, of the general words, "the courts," as contrasted with the specific words, "the United States circuit courts," in the first and in the third clauses.

The second clause positively directs that "suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

Had there been no bankruptcy proceedings, the bankrupt might have brought suit in any State court of competent jurisdiction; or, if there was a sufficient jurisdictional amount, and the requisite diversity of citizenship existed, or the case arose under the Constitution, laws, or treaties of the United States, he could have brought suit in the Circuit Court of the United States. Act of August 13, 1888, c. 866; 25 Stat. 434. He could not have sued in a District Court of the United States, because such a court has no jurisdiction of suits at law or in equity between private parties, except where, by special provision of an act of Congress, a District Court has the powers of a Circuit Court, or is given jurisdiction of a particular class of civil suits.

It was argued for the appellant that the clause cannot apply to a case like the present one, because the bankrupt could not have brought a suit to set aside a conveyance made by himself in fraud of his creditors. But the clause concerns the jurisdiction only, and not the merits, of a case; the forum in which a case may be tried, and not the way in which it must be decided; the right to decide the case, and not the principles which must govern the decision. The bankrupt himself could have brought a suit to recover property, which he claimed as his own, against one asserting an adverse title in it; and the incapacity of

the bankrupt to set aside his own fraudulent conveyance is a matter affecting the merits of such an action, and not the jurisdiction of the court to entertain and determine it.

The Bankrupt Acts of 1867 and 1841, as has been seen, each contained a provision conferring in the clearest terms on the circuit and district courts of the United States concurrent jurisdiction of suits at law or in equity between the assignee in bankruptcy and an adverse claimant of property of the bankrupt. We find it impossible to infer that when Congress, in framing the act of 1898, entirely omitted any similar provision, and substituted the restricted provisions of section 23, it intended that either of those courts should retain the jurisdiction which it had under the obsolete provision of the earlier acts.

On the contrary, Congress, by the second clause of section 23 of the present Bankrupt Act, appears to this court to have clearly manifested its intention that controversies, not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the district courts of the United States, "unless by consent of the proposed defendant," of which there is no pretence in this case.

One object in inserting this clause in the act may well have been to leave such controversies to be tried and determined, for the most part, in the local courts of the State, to the greater economy and convenience of litigants and witnesses. See *Shoshone Mining Co. v. Rutter*, 177 U. S. 505, 511, 513.

Two or three minor provisions of the Bankrupt Act of 1898, sometimes supposed to be inconsistent with this conclusion, may be briefly noticed.

Section 26 provides that the trustee may, pursuant to the direction of the court of bankruptcy, submit to arbitration any controversy arising in the settlement of the estate, and that the award of the arbitrators "may be filed in court," evidently meaning the court of bankruptcy. But no such arbitration could be had without the consent of the adverse party to the controversy in question.

The powers conferred on the courts of bankruptcy by clause 3 of section 2, and by section 69, after the filing of a petition in bankruptcy, and in case it is necessary for the preservation of property of the bankrupt, to authorize receivers or the marshals to take charge of it until a trustee is appointed, can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant, and have no bearing upon the question in what courts the trustee may sue him.

The supervisory jurisdiction over proceedings in bankruptcy, conferred by the act of 1867 upon the circuit courts of the United States, and by the existing act upon the circuit courts of appeals, does not affect this case. 30 Stat. 553.

For the reasons above stated, we are of opinion that the questions of jurisdiction certified by the district judge should be answered as follows:

"1st. The provisions of the second clause of section 23 of the Bankrupt Act of 1898 control and limit the jurisdiction of all courts, including the several district courts of the United States, over suits brought by trustees in bankruptcy to recover or collect debts due from third parties, or to set aside transfers of property to third parties, alleged to be fraudulent as against creditors, including payments in money or property to preferred creditors.

"2d. The District Court of the United States can, by the proposed defendants' consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy to set aside fraudulent transfers of money or property, made by the bankrupt to third parties before the institution of the proceedings in bankruptcy.

"3d. The District Court for the Northern District of Iowa cannot take jurisdiction over this suit as it now stands on the record."

The result is that the decree of the District Court, dismissing the bill for want of jurisdiction, must be

*Affirmed.*¹

Orbit

WHITE v. SCHLOERB.

SUPREME COURT OF THE UNITED STATES, APRIL 26-MAY 28, 1900.

[Reported in 178 United States, 542.]

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

The material facts of this case may be briefly recapitulated. After the District Court of the United States had adjudged Schloerb and Schickedantz bankrupts on their own petition, and had referred the case to a referee in bankruptcy, and the referee had taken possession of the bankrupts' stock of goods in their store, and had caused the entrance of the store to be locked up, and before the appointment of the trustee in bankruptcy, a writ of replevin of some of those goods

¹ Mitchell v. McClure, 178 U. S. 539; Hicks v. Knost, 178 U. S. 541; Wall v. Cox, 181 U. S. 244, acc.

These decisions make unnecessary an examination of the many conflicting previous decisions of the lower courts on the jurisdiction of the District Court. They are collected in Collier on Bankruptcy (3d. ed.) 239, 240. Later decisions applying the rules laid down in *Bardes v. Hawarden Bank* are *Re Steuer*, 104 Fed. Rep. 976; *Re Ward*, 104 Fed. Rep. 985; *Re Nugent*, 105 Fed. Rep. 581 (C. C. A.); *Woodruff v. Cheeves*, 105 Fed. Rep. 601; *Re Seebold*, 105 Fed. Rep. 910 (C. C. A.); *Pickens v. Dent*, 106 Fed. Rep. 653 (C. C. A.); *Smith v. Belford*, 106 Fed. Rep. 658; *Re Bender*, 106 Fed. Rep. 873; *Re Sheinbaum*, 107 Fed. Rep. 247; *Re Steed*, 107 Fed. Rep. 682; *Boonville Nat. Bank v. Blakey*, 107 Fed. Rep. 891; *Sinsheimer v. Simonson*, 106 Fed. Rep. 870, 107 Fed. Rep. 898; *Re Green*, 108 Fed. Rep. 616; *Re Nixon*, 110 Fed. Rep. 633, 637.

was sued out by other persons against the bankrupts from an inferior court of the State of Wisconsin, and was executed by the sheriff of the county, by his deputy, by forcibly entering the store and taking possession of these goods. The bankrupts thereupon presented to the District Court of the United States a petition, setting forth the above facts, and alleging that the goods replevied were their lawful property, and had been purchased by them of the plaintiffs in replevin, and were now in the possession of the sheriff and his deputy and the attorney of those plaintiffs; and praying that they might be compelled to redeliver the goods to the District Court sitting in bankruptcy, and be restrained from making any disposition thereof. Upon the filing of this petition, the court ordered notice thereof to said sheriff, deputy, and attorney. In answer thereto, they contended that the court had no jurisdiction over the subject-matter; and offered evidence that the grounds of their action of replevin were that the bankrupts had purchased and obtained the goods from them by false and fraudulent representations on which they relied, and that, before suing out the writ of replevin, they had elected to rescind the sale, and had demanded of the bankrupts a return of the goods. The District Court, upon a hearing, made an order restraining the respondents from selling or otherwise disposing of the goods replevied, and directing them to deliver the goods to the trustee in bankruptcy, and directing the trustee, on such delivery, to keep them apart from other property, to abide the further order of the court.

The questions certified concern, not the trial of the title to these goods, but only the judicial custody and lawful possession of them.

Under sections 33-43 of the Bankrupt Act of 1898 and the Twelfth General Order in Bankruptcy, referees in bankruptcy are appointed by the courts of bankruptcy, and take the same oath of office as judges of United States courts, each case in bankruptcy is referred by the court of bankruptcy to a referee, and he exercises much of the judicial authority of that court. 30 Stat. 555-557, 172 U. S. 657.

At the date of this adjudication in bankruptcy by the District Court of the United States, the goods were in the store of the bankrupts, and in their actual possession, and were claimed by them as their property. On the same date, that court referred the case to a referee in bankruptcy, and by his direction the entrance to the store was locked. The goods were then in the lawful possession of and custody of the referee in bankruptcy, and of the bankruptcy court, whose representative and substitute he was. Being thus in the custody of a court of the United States, they could not be taken out of that custody upon any process from a State court.

So far as regards this point, the decision of this court in *Freeman v. Howe*, 24 How. 450, more than covers the case. It was there adjudged that property taken and held by a marshal on a writ of attachment from a court of the United States, directing him to attach the property of one person, could not be taken from his possession on a

writ of replevin from a State court in behalf of another person who claimed the attached property as his own. See also *Peck v. Jenness*, 7 How. 612, 625; *Buck v. Colbath*, 3 Wall. 334, 341; *Covell v. Heyman*, 111 U. S. 176, 182.

The second question certified relates to this point, although it is not so clearly expressed as it might be, and omits to mention in whose possession the property was when the writ of replevin was sued out. To that question, as explained and restricted by the facts set forth in the statement which accompanies it, our answer is: "After an adjudication in bankruptcy, an action of replevin in a State court cannot be commenced and maintained against the bankrupt to recover property in the possession of and claimed by the bankrupt at the time of the adjudication, and in the possession of a referee in bankruptcy at the time when the action of replevin is begun."

The first question remains: "Whether the District Court sitting in bankruptcy had jurisdiction by summary proceedings to compel the return of the property seized?"

By section 720 of the Revised Statutes, "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Among the powers specifically conferred upon the court of bankruptcy by section 2 of the Bankrupt Act of 1898 are to "(15) make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act." 30 Stat. 546. And by clause 3 of the Twelfth General Order in Bankruptcy applications to the court of bankruptcy "for an injunction to stay proceedings of a court or officer of the United States, or of a State, shall be heard and decided by the judge; but he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts." 172 U. S. 657.

Not going beyond what the decision of the case before us requires, we are of opinion that the judge of the court of bankruptcy was authorized to compel persons, who had forcibly and unlawfully seized and taken out of the judicial custody of that court property which had lawfully come into its possession as part of the bankrupt's property, to restore that property to its custody; and therefore our answer to the first question must be: "The District Court sitting in bankruptcy had jurisdiction by summary proceedings to compel the return of the property seized."

These answers to the first and second questions render any further answer to the third question unnecessary.

*Ordered accordingly.*¹

¹ *Re Whitener*, 105 Fed. Rep. 180 (C. C. A.), *acc.*

BRYAN v. BERNHEIMER.

SUPREME COURT OF THE UNITED STATES, OCTOBER 31, 1900-
APRIL 15, 1901.

[*Reported in 181 United States, 188.*]

MR. JUSTICE GRAY, after stating the case, delivered the opinion of the court.

The general assignment, made by Abraham to Davidson, did not constitute Davidson an assignee for value, but simply made him an agent of Abraham for the distribution of the proceeds of the property among Abraham's creditors. This general assignment was of itself an act of bankruptcy, without regard to the question whether Abraham was insolvent. Bankrupt Act of July 1, 1898, c. 541, § 3; *West Co. v. Lea*, 174 U. S. 590.

Nine days after this assignment, certain creditors of Abraham filed a petition in the District Court of the United States to have him adjudged a bankrupt, alleging this assignment as an act of bankruptcy. After the filing of that petition, Davidson sold the property to Bernheimer, and the District Court, after the adjudication of bankruptcy, and on petition of the same creditors, alleging that, unless the court made an order requiring the property to be taken immediate possession of, the petitioners and all other creditors of Abraham would be greatly damaged, and their dividends out of the estate generally lessened, and praying for an order to the marshal to take possession of the property, ordered the marshal to do so; and on his petition for instructions as to the property so seized, ordered notice to Bernheimer to appear in ten days, and to propound any claim that he had to the property, or, on failing to do so, be decreed to have no right to it. In obedience to that order, Bernheimer came into court, and propounded a claim to the property under the sale by Davidson to him, alleging that if he was deprived of it, and Davidson was allowed also to keep the price paid, his position would be one of great hardship; submitting his claim to the court, and asking it to make such orders as might be necessary for his protection; and praying that the creditors be remitted to their claim against Davidson for such price, or, if the claimant was mistaken in the relief he prayed for, for an order that such price be paid by Davidson into court and paid over to the claimant, who thereupon offered to rescind the purchase and to waive all further claim to the property.

The District Court sustained a demurrer of the petitioning creditors to this claim, and decreed that Bernheimer had no title superior to the title of the bankrupt estate. On his appeal from that decree the Circuit Court of Appeals reversed it, and ordered the property to be restored

to him, with costs, counsel fees, expenses and damages, occasioned to him by the seizure. The marshal, on behalf of the petitioning creditors, thereupon obtained this writ of certiorari.

The case, as the opinion of the Circuit Court of Appeals states, presents this question: "Did the District Court, as a court of bankruptcy, have jurisdiction to try the title to the goods involved in this controversy by summary proceedings, seizing the goods, and requiring Louis Bernheimer, the purchaser at the assignee's sale, by a rule entered against him, to appear before that court within ten days and propound any claim he had to the goods, or any part thereof; or, failing therein, that he be decreed to have no claim or right thereto?"

The Bankrupt Act of 1898, § 2, invests the courts of bankruptcy "with such jurisdiction, at law and in equity, as to enable them to exercise original jurisdiction in bankruptcy proceedings, in vacation in chambers, and during their respective terms"; to make adjudications of bankruptcy; and, among other things, (3) appoint receivers or the marshals, upon application of the parties in interest, in case the courts shall find it absolutely necessary for the preservation of estates to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified; " (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy; (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided." The exception refers to the provisions of section 23, by virtue of which, as adjudged at the last term of this court, the District Court can, by the proposed defendant's consent, but not otherwise, entertain jurisdiction over suits brought by trustees in bankruptcy against third persons to recover property fraudulently conveyed by the bankrupt to them before the institution of proceedings in bankruptcy. *Bardes v. Hawarden Bank*, 178 U. S. 524; *Mitchell v. McClure*, 178 U. S. 539; *Hicks v. Knost*, 178 U. S. 541.

The present case involves no question of jurisdiction over a suit by a trustee against a person claiming an adverse interest in himself.

Nor is it a petition under section 3 *e* or section 69 of the Bankrupt Act of 1898, each of which relates to applications to take charge of and hold property of a bankrupt after the petition and before the adjudication in bankruptcy. The provisions of those sections, requiring the applicants to give bond for damages, have no application to a case where there has been an adjudication of bankruptcy, and the property thereby brought within the jurisdiction of the court of bankruptcy.

But it is a petition filed after an adjudication of bankruptcy and before the appointment of a trustee; and must rest on the authority given to the court of bankruptcy, by clause 3 of section 2, to "appoint receivers or the marshals, upon application of parties in interest, in case the courts will find it absolutely necessary for the preservation of

estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified." Does this include property of the bankrupt in the hands of third persons?

The Bankrupt Act of March 2, 1867, c. 176, § 40, provided that upon the filing of a petition for an adjudication of involuntary bankruptcy, if probable cause should appear for believing that the debtor was about to remove or conceal, or to make any fraudulent conveyance of his property, the court might issue a warrant to the marshal commanding him "forthwith take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court." 14 Stat. 536, Rev. Stat. § 5024. It was held by the Court of Appeals of New York that this did not authorize the marshal to take possession of the goods of the bankrupt in possession of third persons claiming title thereto. *Doyle v. Sharp*, 74 N. Y. 154. But that decision was overruled by this court, and Mr. Justice Miller in delivering its opinion said:—

"The act of Congress was designed to secure the possession of the property of the bankrupt, so that it might be administered under the proceedings in the bankrupt court. Between the first steps initiating proceedings in the bankrupt court and the appointment of the assignee, a considerable time often passes. During that time, the property of the bankrupt, especially in a case commenced by creditors, may be surreptitiously conveyed beyond the reach of the court or of the assignee, to whose possession it should come when appointed. If the bankrupt does not voluntarily aid the court, or is inclined to defeat the proceedings, he can, with the aid of friends or irresponsible persons, sell his movable property and put the money in his pocket, or secrete his goods or remove them beyond the reach of his assignee or the process of the court and defy the law. The evidence in this case shows the manner in which this can be done. It was the purpose of the act of Congress to prevent this evil. It therefore provides that, as soon as the petition in bankruptcy is filed, the court may issue to the marshal a provisional warrant directing him to take possession of the property and effects of the bankrupt and hold them subject to the further order of the court. To have limited this right or duty of seizure to such property as he might find in the actual possession of the bankrupt would have manifestly defeated in many instances the purposes of the writ. There is therefore no such limitation expressed or implied. As in the writ of attachment, or the ordinary execution of a judgment for the recovery of money, the officer is authorized to seize the property of the defendant, wherever found; so here it is made his duty to take into his possession the property of the bankrupt wherever he may find it. It is made his duty to collect and hold possession until the assignee is appointed or the property is released by some order of the court, and he would ill perform that duty if he should accept the statement of every man in whose custody he found the property which he believed would belong to the assignee, when appointed, as a suffi-

cient reason for failing to take possession of it." *Sharpe v. Doyle*, 101 U. S. 686, 689, 690. A like decision was made in *Feibelman v. Packard*, 109 U. S. 421.

These considerations are equally applicable to an application, after the adjudication in bankruptcy and before the qualification of a trustee, for an appointment of the marshal, under clause 3 of section 2 of the Bankrupt Act of 1898, to take charge of "the property" of the bankrupt "after the filing of the petition and until it is dismissed or the trustee qualified." It is true that under this provision the appointment is only to be made "in case the courts shall find it absolutely necessary for the preservation of the estates." But that condition of things is shown, in the present case, by the allegation of the application, and the finding of the court of bankruptcy, that it was necessary to the interest of the creditors of the bankrupt to take immediate possession of his property.

In the opinion in *Bardes v. Hawarden Bank*, 178 U. S. 524, 538, it was indeed said: "The powers conferred on the courts of bankruptcy by clause 3 of section 2, and by section 69, after the filing of a petition in bankruptcy, and in case it is necessary for the preservation of property of the bankrupt, to authorize receivers or the marshals to take charge of it until a trustee is appointed, can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant, and have no bearing upon the question in what courts the trustee may sue him." But the remark, "can hardly be considered as authorizing the forcible seizure of such property in the possession of an adverse claimant," was an inadvertence, and upon a question not arising in the case then before the court, which related exclusively to jurisdiction of a suit by the trustee after his appointment.

Moreover, the consent of the proposed defendant, Bernheimer, to this mode of proceeding is shown by the terms of his claim, in which, not protesting against the jurisdiction of the court of bankruptcy, he expressly submitted his claim to that court, and asked for such orders as might be necessary for his protection.

Considering that the property was not held by Davidson under any claim of right in himself, but under a general assignment which was itself an act of bankruptcy; that no trustee had been appointed; that the sale by Davidson to Bernheimer was made after and with knowledge of the petition in bankruptcy; and that Bernheimer consented to the form of proceedings; we are of opinion that Bernheimer had no title superior to the title of the bankrupt's estate; that the District Court, as a court of bankruptcy, was authorized so to decide in this proceeding; and that the decree of the Circuit Court of Appeals, directing the goods to be restored to Bernheimer, must be reversed.

The question remains what further order should be made. It is manifestly inequitable that Bernheimer should lose both the goods themselves and the price which he had paid to Davidson for them. His equities in that respect, and the rightful claim of the bankrupt's

creditors against him, may depend upon many circumstances, and can be best settled in the District Court, which has authority, under clause 6 of section 2 of the Bankruptcy Act of 1898, to bring in Davidson if necessary for the complete determination of the matter.

Judgment of the Circuit Court of Appeals reversed, and case remanded to District Court for further proceedings in conformity with this opinion.

CHAPTER VIII.

PROTECTION, EXEMPTIONS, AND DISCHARGE OF BANKRUPT.

SECTION I.

PROTECTION.

IN RE CLAIBORNE.

DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK,
APRIL 29, 1901.

[Reported in 109 Federal Reporter, 74.]

BROWN, District Judge. In an action heretofore brought by the bankrupt in the New York Supreme Court against Adam E. Schatz, late city judge of Mt. Vernon, Westchester County, to recover damages for alleged false imprisonment upon a warrant of arrest theretofore issued by him against the bankrupt, a judgment dismissing the complaint with \$66.82 costs was entered against the bankrupt on December 22, 1900. Under the State law the plaintiff in such an action, if unsuccessful, is liable to an execution against the person for the recovery of the costs of the suit; and upon such an execution issued on March 6, 1901, the defendant was arrested and committed by the sheriff. Afterwards and while in custody, the bankrupt caused to be filed his voluntary petition in bankruptcy on April 20, 1901, and on that day procured from this court a writ of habeas corpus to inquire into the cause of his detention. In obedience to the writ the sheriff produced the bankrupt before the court, whereupon the foregoing facts appeared.

It is contended for the bankrupt that he is entitled to a discharge from custody, for the reason that the judgment for costs is a provable debt under section 63 a (1), and would be barred by a discharge in bankruptcy because not within the exception of section 17 a (2). I am inclined to think the latter claim to be correct, because the present debt is not within the language of section 17 a (2). That clause applies only to judgments "in actions for wilful and malicious injury to the person or property of another;" that is, of some person other than the bankrupt, in which the bankrupt may be adjudged answerable for damages for a wilful injury to such other person. The present

action was not of that kind; it was brought by the bankrupt to recover for a wilful injury to himself, and the judgment adjudicated that there was no such injury. Although the defendant in that action is entitled under the New York law to an execution against the person for costs, that does not enlarge the scope of the exception under section 17 of the bankrupt act.

But whether the above construction of section 17 a (2) be correct or not, I do not find any warrant in the bankruptcy law, or in the general orders of the Supreme Court, for the discharge of the bankrupt from custody. Section 9 seems to provide only for exemption from arrest upon process after bankruptcy proceedings are commenced; and section 11 applies only to a stay of suits pending or the issue of further process therein. General order No. 30 of the Supreme Court (18 Sup. Ct. viii.) provides for cases where the bankrupt is in custody under an arrest made both before and after the initiation of the bankruptcy proceedings; but it is only in cases where the bankrupt has been arrested or committed after the filing of his petition, that the court is authorized to grant a discharge from imprisonment, even though the debt be provable. The language of general order No. 30 is explicit, that:—

“If, at the time of preferring his petition, the debtor shall be imprisoned, the court, upon application, may order him to be produced upon habeas corpus, by the jailer or any officer in whose custody he may be, before the referee, for the purpose of testifying in any matter relating to his bankruptcy.” 18 Sup. Ct. viii.

I find no further warrant anywhere for interference with the custody of the prisoner when he was imprisoned under lawful process before filing the petition. The application in this case not being for the purpose stated in general order No. 30, but for the debtor's full discharge from custody, it must be denied, and the writ dismissed.¹

¹ *Re Walker*, 1 Low. 222; *Hazleton v. Valentine*, 1 Low. 270; *Minon v. Van Nostrand*, 1 Low. 458, Holmes, 251; *Brandon Nat. Bank v. Hatch*, 57 N. H. 460; *Hussey v. Danforth*, 77 Me. 17, acc. See also *Re Cheney*, 5 Fed. Cas. No. 2,636; *Re Hoskins*, Crabbe, 466; *Re Rank*, Crabbe, 443.

Arrest on criminal process is permissible, though the criminal proceedings are connected with proceedings to collect a debt and the debt is barred by a discharge. *Stockwell v. Silloway*, 105 Mass. 517.

WAGNER v. UNITED STATES.

CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT,
OCTOBER 2, 1900.

[Reported in 104 Federal Reporter, 133.]

BEFORE LURTON, DAY, and SEVERENS, Circuit Judges.

DAY, Circuit Judge, after stating the foregoing facts, delivered the opinion of the court.

There can be no question that, under the constitution and laws of the United States, exclusive power is given to the courts of the United States in matters of bankruptcy. By section 11 of the "act of 1898, to establish a uniform system of bankruptcy throughout the United States," it is provided that a suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition. If such person is adjudged a bankrupt, then such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined. From the statement of this case it appears that Houston, having been adjudicated a bankrupt, filed an application for a restraining order against the opposing party to restrain further proceedings for the collection of alimony under the decree awarding alimony to his wife. The District Court, acting upon the belief and understanding that this claim was one for which a discharge, when granted, would be a release, exercised the power conferred by the statute, and granted the restraining order, which was duly served before the order punishing the bankrupt for contempt was made by the State court. After the service thereof, and acting with knowledge thereof,¹ as appears in the record, the State court made the order recited in the statement of facts, committing the bankrupt to jail for nonpayment of the alimony theretofore decreed. It is said that this was a punishment in the State court for acts theretofore committed in violation of orders of the court, and for which the State court had the power and jurisdiction to punish the bankrupt notwithstanding the proceedings in bankruptcy and the restraining order which had been granted in the case. Upon examination, we are

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¹ It has been held that where a State court has made an arrest, application for release must first be made to the State court. *Re Migel*, 2 B. R. 481; *Re O'Mara*, 4 Biss. 506. But the decision of the State court is certainly not final, and in some cases the bankruptcy court acts though no application has been made to the State court. *Re Wiggers*, 2 Biss. 71; *Re Williams*, 6 Biss. 233; *Re Glaser*, 2 Ben. 180. See also decisions under the act of 1841. *Ex parte Mifflin*, 17 Fed. Cas. No. 9,537; *United States v. Dobbins*, 25 Fed. Cas. No. 14,971; *Re Winthrop*, 30 Fed. Cas. No. 17,900.

constrained to take a different view of this order. It does not purport to be a punishment for a criminal contempt, but a committal of the bankrupt for the nonpayment of the alimony in question. It is a punishment for civil contempt, the object of the order being to coerce payment of the sums of alimony theretofore ordered to be paid. The restraining order in the bankruptcy court had distinctly directed that no further proceedings be had for the collection of other sums of alimony pending the bankruptcy proceedings. In other words, it seems to us quite clear that the State court undertook to punish the bankrupt for nonperformance of the very things which the bankrupt court, exercising the power granted by law, had restrained the party in interest from compelling the bankrupt to do. The question therefore presented is whether the bankrupt, having been committed in violation of the restraining order theretofore made by the bankruptcy court, exercising its plenary power, can be released from imprisonment under proceedings in habeas corpus. The question elaborately argued, but which we deem unnecessary to decide, is whether a decree for alimony is a provable debt under the bankrupt law. The real issue to be determined here is as to the force and effect of the order made within the jurisdiction conferred by law upon the bankruptcy court. It seems to us it is immaterial whether the court's view of the provability of the alimony claim in bankruptcy is sound or unsound. Jurisdiction is lawfully given to the bankruptcy court to stay proceedings pending bankruptcy upon claims which are provable. As jurisdiction is thus given to the bankruptcy court when an application is presented to it for a restraining order under this power to determine whether the claim is thus provable, an erroneous decision does not make void the judgment of the court. It is unnecessary to cite authorities to the proposition that an order within the jurisdiction of the court until reversed is binding and conclusive upon all parties. The question is not whether the discharge, when granted, will be a bar to an action for the recovery of alimony, but whether the orders of the court were within its jurisdiction under the power granted by law. The court, in passing upon applications under this section of the bankrupt law, is given the right to determine the question of the provability of debts. This is necessarily so in the execution of the power conferred by statute. This order, then, being within the jurisdiction of the court, is valid and binding upon all parties. There can be no question that the imprisonment and punishment of the bankrupt in violation of this order is such a deprivation of his liberty as justifies his release upon an order in habeas corpus. In the administration of justice the courts of the United States, by all proper means, should endeavor to avoid conflict of jurisdiction with the State courts, and a similar obligation rests upon the latter in reference to matters committed by law to the jurisdiction of the former. In the enforcement of the powers conferred by the constitution and laws in bankruptcy matters, so long as the District Court acts in the matter within its powers, its jurisdiction is exclusive and supreme. Finding that the bankruptcy court was acting

within its jurisdiction in issuing a restraining order, and that the bankrupt was committed in violation thereof, we think the conclusion reached by the District Court proper.

*The order of the court will be affirmed.*¹

IN RE MARCUS.

CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT,
JANUARY 17, 1901.

[*Reported in 105 Federal Reporter, 907.*]

BEFORE COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

PUTNAM, Circuit Judge. The bankrupt against whom this petition was brought was arrested on an execution which issued from the superior court for and within the county of Suffolk, in the State of Massachusetts, on a judgment rendered after the adjudication in bankruptcy. The judgment was for costs in a suit brought by the bankrupt against the petitioner before the petition in bankruptcy was filed, which suit was disposed of in favor of the petitioner, and judgment thereon entered as already said. At the time of his arrest the bankrupt held a writ of protection, as follows:—

“Commonwealth of Massachusetts. In the District Court of the United States for the District of Massachusetts. In the Matter of Alfred A. Marcus and Simeon Marcus, Bankrupts, in Bankruptcy.

“To all Persons Interested in Said Estate. Whereas, said bankrupts, on the twentieth day of March, A. D. 1900, did apply to me, James M. Olmstead, a referee in bankruptcy for and as said District Court, for a writ of protection, it is hereby ordered and decreed that said bankrupts be, and are hereby, protected and exempt from arrest in all civil actions brought against them, save in those which are exempted by section 9 of the bankruptcy act. This order to continue until the final adjudication on their application for their discharge, unless suspended or vacated by order of this court; and it is further ordered or decreed that all persons are prohibited from arresting the said Alfred A. Marcus and Simeon Marcus, save as aforesaid, until adjudication on their application for a discharge.

¹ Where a State court has made a decision of a question of fact (*e. g.* whether a debt was created by fraud) upon which a right to arrest depends, it has generally been held that the bankruptcy court will regard this decision as final, though based merely on affidavits. *Re Devoe*, 1 Low. 251; *Re Kimball*, 2 Ben. 554; 6 Blatch. 292; *Re Valk*, 3 Ben. 431; *Re Robinson*, 6 Blatch. 253. But see *contra*, *Re Kimball*, 2 Ben. 138; *Re Glaser*, 2 Ben. 180; *Re Williams*, 6 Bias. 233; *Re Alsberg*, 16 B. R. 116. In *Re Kimball*, 2 Ben. 554 (affirmed in 6 Blatch. 292), however, Judge Blatchford overruled his own decisions in *Re Kimball*, 2 Ben. 138, and *Re Glaser*, 2 Ben. 180.

"Witness my hand at Boston, in said district, this seventeenth day of May, A. D. 1900.

JAMES M. OLMSTEAD."

The bankrupt applied to the District Court, sitting in bankruptcy, to be discharged from the arrest, and a discharge was ordered, and this petition was brought to revise that adjudication. The record shows that, in ordering the discharge, the court relied on the writ of protection, though apparently its specific terms were not brought to its attention, and that it did not rely on the provision in the bankrupt act of July 1, 1898 (section 9 a), which exempts a bankrupt from arrest when in attendance upon a court of bankruptcy, or when engaged in the performance of a duty imposed by the act, nor on the broad powers asserted for courts of bankruptcy by the Circuit Court of Appeals for the Sixth Circuit in *Wagner v. U. S. (C. C. A.)*, 104 Fed. 133.

The bankrupt was adjudicated such on his own petition filed before the judgment for costs was rendered, as already said. Therefore the costs were not provable against his estate, and consequently they were within the letter of the express exceptions in section 9 a, so far as they relate to arrests on civil process when issued upon a debt or claim from which a discharge in bankruptcy is not a release. Section 63 a directs specifically what taxable costs are provable, and its provisions with reference thereto must be held to cover that entire subject-matter, and to exclude such costs from being considered in connection with those parts of the act which relate to provable "unliquidated claims." In this particular we agree with the conclusions of Judge Lowell, sitting in the District Court for the District of Massachusetts, reported in *Re Marcus (D. C.)*, 104 Fed. 331. We also agree with the conclusions there expressed, that, ordinarily, a bankrupt is not entitled to be protected from arrest on an execution of the character of that now before us. We also concur in the construction and effect there given to the writ of protection in that case, which we are advised was the same in form as the writ of protection in the case at bar, in that it relates only to actions on claims or debts which are provable.

We are not called upon to determine what should be our action if the court below had undertaken to proceed on the broad principles asserted in *Wagner v. U. S.*, or had held that the bankrupt should be discharged from arrest because he was in attendance on the court, or engaged in the performance of some duty imposed on him. Under the circumstances, the arrest cannot be regarded as illegal, the bankrupt should not have been discharged therefrom, and this petition is well grounded.

Let there be a decree for the petitioner, with costs against the respondents.¹

¹ Similarly no relief can be had against arrest in an action to collect a debt created by fraud or by misappropriation of the debtor while acting in a fiduciary capacity; since such debts though provable are not barred by a discharge. *Re Devoe*, 1 Low. 251; *Re Seymour*, 1 Ben. 348; *Re Kimball*, 2 Ben. 38; *Re Patterson*, 2 Ben. 155; *Re Glaser*, 2 Ben. 180; *Re Pettis*, 2 B. R. 44; *Harter v. Harlan*, 2 B. R. 236; *Re Alsberg*, 16 B. R. 116.

SECTION II

EXEMPTIONS.

IN RE HATCH.

DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA,
JUNE 19, 1900.

[Reported in 102 Federal Reporter, 280.]

SHIRAS, District Judge. From the facts certified by the referee in this case, it appears that on the 1st day of March, 1899, the bankrupt, James H. Hatch, executed and delivered to E. D. Mahon a chattel mortgage upon certain personal property, including one bay mare and a lumber wagon, to secure the payment of a debt of \$125; that this mortgage was not filed for record or recorded as required by the provisions of the Code of Iowa; that on the 30th day of March, 1900, James H. Hatch was duly adjudged a bankrupt upon his own petition, and a trustee of his estate was appointed and qualified; that upon the application of the bankrupt the property exempt to him was set apart, there being included therein the bay mare and lumber wagon covered by the mortgage to E. D. Mahon; that the said E. D. Mahon filed her claim, based upon the note held by her and the chattel mortgage, and asked that the same be allowed as a preferred claim against the property included in the mortgage; that upon a hearing had before the referee it was ordered "that said claim be denied as a secured or preferred claim, but the same shall stand as a common claim, and be, and the same is, allowed as such for \$72.75," — the referee holding that the failure to record the mortgage rendered it invalid, under section 67 a of the bankrupt act. It further appears that on the 26th day of May, 1900, E. D. Mahon filed a petition before the referee, asking that an order be made requiring the bankrupt to turn over and deliver to the trustee the bay mare and wagon set apart as exempt property, in order that the trustee might sell the same, and apply the proceeds to the payment of the claim due the petitioner. Upon the hearing on this petition the referee entered an order to the effect "that on demand the bankrupt, James H. Hatch, shall surrender and deliver to Edgar Daggett, trustee herein, the said mare, Nell, and the said lumber wagon; the said trustee to sell the same at public auction, first posting ten days' notice of the time and place of said sale, or at private sale, for not less than seventy-five per cent of the appraisal; the proceeds, less expense of taking, keeping, and selling, or so much thereof as may be necessary, to be paid to the said E. D. Mahon." — To this order the bankrupt excepted, and now presents the question of the validity of the order to this court for determination.

By the provisions of section 70 of the bankrupt act it is declared that there shall be vested in the trustee the title of the bankrupt as it existed at the date of the adjudication, to the various kinds of property enumerated in the section, "except in so far as it is to property which is exempt. As the bay mare and the lumber wagon in controversy were set apart to the bankrupt as property exempt under the provisions of the Code of Iowa, it follows that the trustee is not vested with the title to this property, nor has he any equity therein as the representative of the general creditors. The trustee cannot assert any right to the property, nor show any ground for asking an order for a sale thereof. The actual possession of the property is held by the bankrupt, and since the same was segregated from the estate, and assigned to the bankrupt as exempt, it has ceased to be within either the actual or constructive possession of the court of bankruptcy. The situation is not one, therefore, which enables the creditor to invoke the jurisdiction of the court on the ground that, as the property is in the possession of the court, it can take jurisdiction over claims sought to be enforced against the property. The order excepted to requires the bankrupt, on demand, to deliver up the possession of the property to the trustee, and then directs the trustee to make sale thereof for the benefit of the mortgagee. The jurisdiction cannot, therefore, be sustained on the theory that the court has possession of the property; and I fail to see upon what ground the court in bankruptcy can undertake to direct the sale of property not in its possession, to which the trustee has no title, and in which the creditors have no interest or equity. The question whether the mortgagee can enforce the mortgage against the horse and wagon is one in which the other creditors and the trustee have no interest, but is simply a question to be decided between the mortgagor and mortgagee; and as the property in dispute does not form any part of the bankrupt's estate, and is not in the possession or under the control of the court, the referee should have refused to entertain the petition of the mortgagee, for want of jurisdiction. The order excepted to is therefore reversed, and the referee is directed to enter an order dismissing the petition, for the reason stated.¹

¹ *Re Bass*, 3 Woods, 382; *Rix v. Capitol Bank*, 2 Dill. 367; *Re Camp*, 91 Fed. Rep. 745; *Re Hill*, 96 Fed. Rep. 185; *Re Grimes*, 96 Fed. Rep. 529; *Woodruff v. Cheeves*, 105 Fed. Rep. 601 (C. C. A.); *Re Little*, 110 Fed. Rep. 621, *acc.* See also *Re Poleman*, 5 Bias. 526; *Re Stevens*, 5 B. R. 298; *Re Preston*, 6 B. R. 545; *Byrd v. Harrold*, 18 B. R. 433.

Re Garden, 93 Fed. Rep. 423; *Re Woodruff*, 96 Fed. Rep. 317 (reversed 105 Fed. Rep. 601); *Re Sisler*, 96 Fed. Rep. 402, *contra.*

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SECTION III.

DISCHARGE.

RE MUSSEY.

DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS,
JANUARY 15, 1900.

[Reported in 99 Federal Reporter, 71.]

LOWELL, District Judge. This was a voluntary petition filed July 8, 1899. On October 27, 1897, the bankrupt had filed a voluntary petition in insolvency, upon which proceedings are now pending. She has now applied for her discharge in bankruptcy, and certain creditors who proved their claims in the insolvency proceedings ask that the discharge granted her shall expressly exempt from its operation all claims proved in insolvency, or within the jurisdiction of the insolvency court, and also such claims as were created by her fraud. It was held in *Re Rhutassel* (D. C.) 96 Fed. 597, that the only issue tendered by the petition for a discharge is the right to the discharge, and that the only facts properly pleadable in opposition thereto are those which show that the bankrupt is entitled to no discharge whatsoever. "The issue upon the effect of a discharge will arise when a creditor seeks to enforce a judgment or claim, and the debtor pleads his discharge in bar thereof." See also *In re Thomas* (D. C.) 92 Fed. 912. The discretion of this court cannot determine the effect of a discharge in bankruptcy upon debts proved in insolvency. These debts are either barred by the discharge as matter of law, or else, as matter of law, remain unaffected thereby. The question of law is raised upon the creditors' suit to enforce these debts more conveniently than upon the petition for discharge, and so it is more convenient that the discharge shall be in the usual form, and that its scope shall be left for future determination. The same considerations apply to debts created by the bankrupt's fraud. Alleged fraud raises an issue of fact, which will be determined upon the creditors' suit to enforce the debt alleged to be created by fraud more conveniently than upon the bankrupt's application for his discharge. The discharge will therefore be granted in the usual form.¹

¹ *Re Rathbone*, 2 Ben. 138; *Re Rosenfield*, 1 B. R. 575; *Re Wright*, 2 B. R. 41; *Re Clarke*, 2 B. R. 110; *Re Elliott*, 2 B. R. 110; *Re Stokes*, 2 B. R. 212; *Re Tracy*, 2 B. R. 298; *Re Thomas*, 92 Fed. Rep. 912; *Re Rhutassel*, 96 Fed. Rep. 597; *Re Marshall Paper Co.*, 102 Fed. Rep. 872 (C. C. A.); *Re McCarty*, 111 Fed. Rep. 151, acc. See also *Chapman v. Forsyth*, 2 How. 202.

In *Re Tinker*, 99 Fed. Rep. 79, this doctrine was applied though there was but one debt on the bankrupt's schedule and that would not be barred. *Conf. Re Maples*, 105 Fed. Rep. 919.

WAY v. HOWE.

SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER, 1871.

[Reported in 108 Massachusetts, 503.]

GRAY, J. This case presents the question whether a certificate of discharge granted by the District Court of the United States under the bankrupt act of 1867, c. 176, can be impeached in a State court (in an action brought upon a debt which was provable against the estate in bankruptcy and which was of a nature to be barred by a valid discharge) on account of a fraudulent conveyance of property by the bankrupt.

It is not doubted that Congress, under the power to establish a uniform system of bankruptcy, may prescribe the conditions upon which a certificate of discharge shall be granted, and the extent and degree of its effect; and that the question before us is therefore to be determined by the provisions of the statute. *Payson v. Payson*, 1 Mass. 283. *Burnside v. Brigham*, 8 Met. 75. Those provisions, so far as they are material to the question at issue, are as follows:—

[The court here stated the substance of sections 1, 21, 29, 31, 32, 33, 34.]

The words “with the exceptions aforesaid” in section 34, like the words “except as hereinafter provided” in section 32, clearly refer to those debts which by the intermediate section are declared not to be barred by any discharge under the act.

With this reservation, section 34 explicitly declares that “a discharge duly granted under this act” (that is to say, by the court and in the manner already pointed out) “shall release the bankrupt from all debts, claims, liabilities, and demands which were or might have been proved against his estate in bankruptcy,” and “may be pleaded as a full and complete discharge to all suits brought thereon,” as well as that “the certificate shall be conclusive evidence in favor of such bankrupt of the fact and regularity of such discharge.”

The only restriction upon these sweeping and comprehensive words is to be found in the ensuing proviso in the same section, which allows any creditor, whose debt was either proved or provable against the estate in bankruptcy, to apply to the court of bankruptcy within two years afterwards, and upon alleging and proving either of the causes mentioned in section 29, and also proving his ignorance thereof until after the granting of the discharge, to obtain a judgment setting aside and annulling it. If he fails to prove either such fraudulent act of the bankrupt, or such ignorance on his own part, judgment is to be rendered in favor of the bankrupt, and the validity of the discharge is not affected.

The decisions under the insolvent laws of this Commonwealth, or the earlier bankrupt acts of the United States, are inapplicable to this case; because the former contained no provision for entirely setting

aside or annulling a discharge once granted, and therefore its invalidity for any of the causes specified in them could only be alleged and proved whenever the discharge was pleaded in any action on a debt; and in the latter the right to impeach the discharge in any such action was expressly reserved. St. 1838, c. 163, § 10; Gen. Sts. c. 118, §§ 87, 88; U. S. Sts. 1800, c. 19, § 34; 1841, c. 9, § 4.

The intention of Congress, in the bankrupt act of 1867, in omitting any such reservation in sections 29 and 34, and in giving a new proceeding by which any creditor, whose debt was proved or provable, may, upon proving a fraudulent act of the bankrupt, have the discharge set aside and annulled, if that act was unknown to him before the discharge was granted, but not otherwise, appears to us to have been, that the question of the discharge of the bankrupt from all debts and claims whatever (except of those classes which are declared not to be affected by any certificate of discharge) should be finally and conclusively settled by the court of bankruptcy within a moderate time, leaving the bankrupt, if he prevails on such trial of that issue, free from future suit, molestation, or embarrassment on account thereof; and that every creditor should be obliged to try the question of the validity of the discharge, if at all, while the facts upon which it depends are comparatively recent, and in such a manner as to enure to the benefit of all the creditors if the discharge is annulled, and should not be allowed to wait until the period prescribed by the general statutes of limitations has nearly expired, and the bankrupt has perhaps established himself anew in business and suffered the means of disproving the charges against him to pass beyond his reach, and then bring a suit to which the other creditors are not parties, and thus harass him on account of his old debts, and obtain an inequitable advantage over them. It follows, that the remedy given by application to a district court of the United States under section 34 of the bankrupt act is exclusive of any other mode of impeaching the validity of a discharge, either in the federal or in the State courts, on account of a fraudulent conveyance by the bankrupt in violation of the bankrupt act. *Simms v. Slacum*, 3 Cranch, 300, 308; *Crocker v. Marine National Bank*, 101 Mass. 240, and authorities cited.

This conclusion is supported by an able judgment of the Supreme Court of Maine in *Corey v. Ripley*, 57 Maine, 69, and by a decision of the Court of Appeals of New York in *Ocean National Bank v. Olcott*, 46 N. Y. 12. See also *Lynn v. Hamilton*, 5 Vroom, 305. The opposing decision in *Beardsley v. Hall*, 36 Conn. 270, appears to have been made without a thorough examination of the provisions of the act of Congress.

We are therefore of opinion that it was rightly ruled by the Superior Court that the defendant's discharge in bankruptcy could not be impeached or invalidated in this action for the cause stated in the replication.

*Exceptions overruled.*¹

¹ *Commercial Bank v. Buckner*, 20 How. 108; *Oates v. Parish*, 47 Ala. 157; *Milhous v. Aicardi*, 51 Ala. 594; *Payne v. Able*, 7 Bush. 344; *Thurmond v. Andrews*, 10

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HILL v. HARDING.

SUPREME COURT OF THE UNITED STATES, APRIL 16-MAY 13, 1889.

[Reported in 130 United States, 699.]

THIS was an action of assumpsit, commenced by Harding and others against Hill in an inferior court of the State of Illinois, in accordance with the statutes of the State, by attachment of the defendant's real estate. The attachment was dissolved, in accordance with those statutes, by the defendant giving bond, or, more strictly speaking, entering into a recognizance, with sureties, conditioned to pay to the plaintiffs "the amount of the judgment and costs which may be rendered against him in this suit on a final trial hereof, within ninety days after such judgment shall be rendered." After verdict for the plaintiffs, and before judgment thereon, and on proceedings in bankruptcy commenced more than four months after the attachment, the defendant was adjudged a bankrupt under the Bankrupt Act of the United States, and applied to the State court, under section 5,106 of the Revised Statutes, for a stay of proceedings to await the determination of the court in bankruptcy upon the question of his discharge. The application was denied, and judgment rendered against the defendant on the verdict, and upon a bill of exceptions, stating these facts, that judgment was affirmed by the Supreme Court of the State. 93 Illinois, 77. Upon a former writ of error, this court reversed the judgment of that court, and remanded the case to it for further proceedings, upon the ground that the defendant was entitled to the stay applied for, without considering the ques-

Bush, 400; Corey v. Ripley, 57 Me. 69; Bailey v. Corruthers, 71 Me. 172; Talbott v. Suit, 68 Md. 443; Black v. Blazo, 117 Mass. 17; Fuller v. Pease, 144 Mass. 390; Heim v. Chapman, 171 Mass. 347; Stevens v. Brown, 49 Miss. 597; Brown v. Covenant Mut. L. I. Co., 86 Mo. 51; Seymour v. Street, 5 Neb. 85; Parker v. Atwood, 52 N. H. 181; Linn v. Hamilton, 34 N. J. L. 305; Ocean Nat. Bank v. Olcott, 46 N. Y. 12; Smith v. Ramsey, 27 Ohio St. 339; Rayl v. Lapham, 27 Ohio St. 452; Howland v. Carson, 28 Ohio St. 625; Alston v. Robinett, 37 Tex. 56. *Acc. Beardsley v. Hall, 36 Conn. 270, contra.*

A few cases arising under the act of 1867 held that if a discharge was granted in fraud of a particular creditor, but could not be attacked in the District Court under the provisions of the bankrupt act, a State court might allow collateral attack of the discharge in an action by that creditor. *Hill v. Robbins*, 1 Brown's Mich. N. P. 305; *Poillon v. Lawrence*, 77 N. Y. 207; *Batchelder v. Low*, 43 Vt. 662. See also *Symonds v. Barnes*, 59 Me. 191. In these cases the fraudulent omission by the bankrupt of the name of a creditor from his schedules and the ignorance of the creditor of the bankruptcy proceedings were held to warrant the State court in disregarding the bankrupt's discharge in an action by the creditor to recover his debt. This principle was of very doubtful correctness under the act of 1867. It is opposed by *Milhous v. Aicardi*, 51 Ala. 594; *Thurmond v. Andrews*, 10 Bush. 400; *Bailey v. Corruthers*, 71 Me. 172; *Fuller v. Pease*, 144 Mass. 390; *Heim v. Chapman*, 171 Mass. 347; *Rayl v. Lapham*, 27 Ohio St. 452. Under the present act, the particular hardship which in the opinion of some courts gave ground for such an exception has been expressly provided for. Sec. 27 a (3).

tion whether the court in which the suit was pending might, after the defendant had obtained his discharge in bankruptcy, render a special judgment in favor of the plaintiff for the purpose of charging the sureties on the recognizance given to dissolve the attachment. 107 U. S. 631, 635.

The case was then remanded by the Supreme Court of Illinois to the inferior court with a direction that, upon its satisfactorily appearing that the defendant since the verdict had obtained his discharge in bankruptcy, a judgment should be entered for the plaintiff and against the defendant upon the verdict, with a perpetual stay of execution. The inferior court thereupon denied a motion of the defendant for leave to file a formal plea setting up his discharge in bankruptcy; admitted in evidence a copy of that discharge, offered by the plaintiff and objected to by the defendant as not duly verified; refused the defendant's request for a trial by jury on the question of his discharge in bankruptcy; denied a motion to enter a judgment in his favor, releasing him from all liability subsequent to the commencement of the proceedings in bankruptcy, on account of all causes of action involved in this suit; and ordered judgment on the verdict, pursuant to the mandate of the Supreme Court of the State, with a perpetual stay of execution. Upon the bill of exceptions the judgment and order were affirmed by the Supreme Court of Illinois. 116 Illinois, 92. The defendant sued out this writ of error.

Mr. *George W. Brandt*, for plaintiff in error.

Mr. *John M. Glover* and Mr. *William H. Barnum*, for defendants in error.

Mr. Justice GRAY, after stating the case as above reported, delivered the opinion of the court.

The question presented by this writ of error is quite distinct from that which arose when the case was before this court at a former term, as reported in 107 U. S. 631. The only point then decided was that the defendant, on his application made after verdict and before judgment, was entitled to a stay of proceedings to await the determination of the court in bankruptcy upon the question of his discharge. The question not then passed upon, and now presented, is whether, since he has obtained his discharge in bankruptcy, there is anything in the provisions of the Bankrupt Act to prevent the State court from rendering judgment on the verdict against him, with a perpetual stay of execution, so as to prevent the plaintiffs from enforcing the judgment against him, and leaving them at liberty to proceed against the sureties in the bond or recognizance given to dissolve an attachment made more than four months before the commencement of the proceedings in bankruptcy.

Such attachments being recognized as valid by the Bankrupt Act (Rev. Stat. § 5044), a discharge in bankruptcy does not prevent the attaching creditors from taking judgment against the debtor in such limited form as may enable them to reap the benefit of their attach-

ment. When the attachment remains in force, the creditors, notwithstanding the discharge, may have judgment against the bankrupt, to be levied only upon the property attached. *Peck v. Jenness*, 7 How. 612, 623; *Doe v. Childress*, 21 Wall. 642.¹ When the attachment has been dissolved, in accordance with the statutes of the State, by the defendant's entering into a bond or recognizance, with sureties, conditioned to pay to the plaintiffs, within a certain number of days after any judgment rendered against him on a final trial, the amount of that judgment, the question whether the State court is powerless to render even a formal judgment against him for the single purpose of charging such sureties, or, in the phrase of Chief Justice Waite in *Wolf v. Stix*, 99 U. S. 1, 9, whether "the judgment is defeated by the bankruptcy of the person for whom the obligation is assumed," depends not upon any provision of the Bankrupt Act, but upon the extent of the authority of the State court under the local law. Whether that authority is exercised under the settled practice of the court,² as in Illinois, or only by virtue of an express statute,³ as in Massachusetts, there is nothing in the Bankrupt Act to prevent the rendering of such a judgment. The bond or recognizance takes the place of the attachment as a surety for the debt of the attaching creditors; they cannot dispute the election, given to the debtor by statute, of substituting the new security for the old one; and the giving of the bond or recognizance, by dissolving the attachment, increases the estate to be distributed in bankruptcy. The judgment is not against the person or property of the bankrupt, and has no other effect than to enable the plaintiff to charge the sureties, in accordance with the express terms of their contract, and with the spirit of that provision of the Bankrupt Act which declares that "no discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise." Rev. Stat. § 5118; *In re Albrecht*, 17 Bankr. Reg. 287; *Hill v. Harding*, 116 Ill. 92; *Barnstable Savings Bank v. Higgins*, 124 Mass. 115.

¹ *Samson v. Burton*, 5 Ben. 325, 341; *May v. Courtney*, 47 Ala. 185; *Ingraham v. Phillips*, 1 Day, 117; *Daggett v. Cook*, 37 Conn. 341; *Alsop v. White*, 45 Conn. 499; *Bowman v. Harding*, 56 Me. 559; *Perry v. Somerby*, 57 Me. 552; *Belfast Savings Bank v. Lancey*, 93 Me. 422, 429; *Davenport v. Tilton*, 10 Met. 320; *Bates v. Tappan*, 99 Mass. 376; *Bosworth v. Pomeroy*, 112 Mass. 293; *Stockwell v. Silloway*, 113 Mass. 382; *Johnson v. Collins*, 116 Mass. 392; *Kittredge v. Warren*, 14 N. H. 509; *Kittredge v. Emerson*, 15 N. H. 227; *Batchelder v. Putnam*, 54 N. H. 84; *Stoddard v. Locke*, 43 Vt. 594, *acc. Conf.*, *Williams v. Atkinson*, 36 Tex. 16.

² *Re Martin*, 105 F. 753; *Re Albrecht*, 17 B. R. 287; *Hill v. Harding*, 116 Ill. 92; *Fisse v. Einstein*, 5 Mo. App. 78; *Zollar v. Janvrin*, 49 N. H. 114; *Batchelder v. Putnam*, 54 N. H. 84; *Holyoke v. Adams*, 1 Hun. 223.

³ *Wolf v. Stix*, 99 U. S. 1; *Odell v. Wootten*, 38 Ga. 324; *Payne v. Able*, 7 Bush. 344; *Carpenter v. Turrell*, 100 Mass. 450; *Hamilton v. Bryant*, 114 Mass. 543; *Braley v. Boomer*, 116 Mass. 527, 529; *Goyer Co. v. Jones* (Mass.), 30 So. Rep. 651; *Martin v. Kilbourne* (Tenn.), 1 Cent. L. J. 94. In Massachusetts the statute of 1875, c. 68, enabled judgment to be given against the sureties though the principal had been discharged in bankruptcy. See *Fickett v. Durham*, 119 Mass. 159; *Barnstable Savings Bank v. Higgins*, 124 Mass. 115.

If the bond was executed before the commencement of proceedings in bankruptcy, the discharge of the bankrupt protects him from liability to the obligees, so that, in an action on the bond against him and his sureties, any judgment recovered by the plaintiffs must be accompanied with a perpetual stay of execution against him; but his discharge does not prevent that judgment from being rendered generally against them. *Wolf v. Stix*, above cited. If the sureties should ultimately pay the amount of any such judgment, and thereby acquire a claim to be reimbursed by their principal the amount so paid (which is a point not now in issue), it would be because his liability to them upon such a claim did not exist at the time of the commencement of the proceedings in bankruptcy, and therefore could not be proved in bankruptcy nor barred by the discharge, and consequently would not be affected by any provision of the Bankrupt Act.

The courts of Illinois, in the judgment rendered in this case, having assumed the validity of the defendant's discharge in bankruptcy, he has not been prejudiced by the rulings denying leave to file after verdict a formal plea of the discharge in bankruptcy, and admitting in evidence an unverified copy of the discharge, and refusing his request for a trial by jury upon that issue.

*Judgment affirmed.*¹

CILLEY v. COLBY.

SUPREME COURT OF NEW HAMPSHIRE, JUNE, 1881.

[Reported in 61 *New Hampshire*, 63.]

ASSUMPSIT, on a note dated July 14, 1876, signed by the defendant as surety. The principal filed his petition in bankruptcy February 6, 1877. The plaintiff proved his claim, and voted for assignee. Subsequently the bankrupt submitted to his creditors a proposition for a composition of 10 per cent in satisfaction of their claims, under section 17 of the amendment to the bankrupt act approved June 22, 1874. The creditors passed a resolution accepting the proposition, the plaintiff voting to ratify and confirm it. His signature was necessary to make the required amount and confirm the resolution. The composition was accepted, and ordered to be recorded. The 10 per cent was paid, and the creditors, including the plaintiff, signed a receipt in full payment and liquidation of their respective claims in composition in bankruptcy, November, 1877.

S. L. Bowers, for the plaintiff.

Edes & Newton, for the defendant.

STANLEY, J. The defendant is liable, unless the plaintiff's vote in favor of a resolution accepting the proposition of 10 per cent, to be

¹ *Re Rosenthal*, 108 Fed. Rep. 368, acc.

paid to the creditors in discharge of their claims against the principal, has the effect to release him. In a composition, no actual discharge of the principal is given; but the payment of the amount offered, and its acceptance by the creditor, is in effect a discharge, for by it all right of action against the bankrupt is barred. "No discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise." U. S. Rev. St. § 5,118. The voluntary discharge of the principal by the creditor discharges the surety; but proceedings in bankruptcy, even though the creditor participates therein, do not have the effect of a voluntary discharge. It is not the act of the creditor alone that makes the composition valid. A majority in number and amount must concur in consenting, and the court must also give its consent. If the plaintiff's consent was necessary, and if his withholding it would have prevented the bankrupt from obtaining his discharge, it does not follow that his signature alone was effectual. It was the concurrent act of a majority in number of the creditors and in amount of their debts, with the assent of the court, that made the composition effectual. Unless these three conditions had coexisted, there would have been no valid composition. *Guild v. Butler*, 122 Mass. 498; *Farwell v. Raddin*, 129 Mass. 7; *Hill v. Trainer*, 49 Wis. 537.

The same construction is given by the English courts to their statute of compositions, from which our own was, no doubt, copied. *Browne v. Carr*, 7 Bing. 508; *Ellis v. Wilmot*, L. R. 10 Ex. 10; *Simpson v. Henning*, L. R. 10 Q. B. 406; *Ex parte Jacobs*, L. R. 10 Ch. 211.

*Judgment for the plaintiff.*¹

PHELPS v. BORLAND.

COURT OF APPEALS OF NEW YORK, NOVEMBER, 1886.

[Reported in 103 New York, 406.]

FINCH, J. The defendant, a citizen of this country, drew a bill of exchange to his own order at sixty days' sight upon Johnston & Co., who were English merchants residing in Liverpool. The defendant sold it to the plaintiffs, who were American bankers, residing in New York. The bill was duly accepted by Johnston & Co., payable in

¹ In none of the cases cited by the court was it found as a fact that except for the plaintiff's assent the bankrupt would not have received a discharge. The fact that the plaintiff assented to a discharge in bankruptcy has generally been held not to release a surety. *Browne v. Carr*, 7 Bing. 508; *Megrath v. Gray*, L. R. 9 C. P. 216; *Ellis v. Wilmot*, L. R. 10 Ex. 10; *Ex parte Jacobs*, L. R. 10 Ch. 211 (overruling *Wilson v. Lloyd*, L. R. 16 Eq. 60); *Re Burchell*, 4 Fed. Rep. 406; *Guild v. Butler*, 122 Mass. 498; *Mason & Hamlin Co. v. Bancroft*, 1 Abb. N. C. 415; *Hill v. Trainer*, 49 Wis. 537. But see *contra*, *Re McDonald*, 14 B. R. 477; *Calloway v. Snapp*, 78 Ky. 561; *Union Nat. Bank v. Grant*, 48 La. Ann. 18.

London, who thereby, as to the plaintiffs, became the principal debtors, the drawer being contingently liable upon their default and holding the position of a surety for the payment of their debt. The bill was protested for non-payment at its maturity, Johnston & Co. having failed and being unable to meet their liabilities, and the holders now sue the drawer to recover its amount. **The latter defends upon the ground** that, as surety, he was entitled, upon payment of the bill, to be subrogated to the rights of the holder, and that the latter had so destroyed or materially impaired those rights as to have lost all remedy against the drawer. The fact relied on as the cause and basis of this result is, that the acceptors were discharged in bankruptcy upon a compromise by the English courts, and that the plaintiffs, who were originally not parties to the proceeding, became so afterward voluntarily, and proved their claim and accepted the composition decreed, whereby the judgment became binding upon them in this country as well as in England, and so the acceptor was wholly discharged and his right of subrogation as surety rendered valueless. The answer made to this contention is, that the foreign discharge in bankruptcy was operative against the holders in this country, even although they had never become parties to the proceeding, and so the release of the acceptor flowed from no act of theirs, and consequently they had not invaded or affected the drawer's rights.

The authority pressed upon our attention, and which we are asked to follow, is that of *May v. Breed*, 7 Cush. 15. The deserved reputation of the court, and the great ability of its reasoning, may well make us hesitate and reflect before adopting a contrary conclusion; but, deeming the question substantially settled, both in our own State and in the federal courts, adversely to the opinion cited, we feel it our duty to acquiesce in that result. Two propositions are conceded on all sides. That the title of a foreign assignee, conferred by the foreign bankrupt law, may be asserted in our courts, but cannot operate or be effectual as against our own citizens pursuing their remedies as creditors against the bankrupt or his property within our jurisdiction, or when the recognition of such title is against our public policy is conceded in *May v. Breed* and has quite recently been decided by us. *In re Waite*, 99 N. Y. 433. And that, as between the States of the Union, a discharge by the law of one will not bar the right of a creditor who is a citizen of another and not a party to the proceeding is equally well settled by a substantial concurrence of authority. The argument of the learned chief justice in the Massachusetts case is largely occupied with an effort to show that these two propositions do not decide the case of a discharge by the foreign court of a debt or obligation contracted under the law of its jurisdiction, and to be there paid and discharged. It is asserted that the cases between citizens of different States in our own country rest, not upon doctrines of international law, but upon provisions of the Federal Constitution and governmental relations peculiar to our national organization. The most important and authoritative of

these is *Ogden v. Saunders*, 12 Wheat. 217, and it is subjected to the double criticism that it did not, in all respects, reflect the opinion of the court, and that it decided no question of international law. The first suggestion was fully and finally answered in *Baldwin v. Hale*, 1 Wall. 223, where the authority assailed was vindicated, and its doctrine expressly ratified and affirmed. The second suggestion seems to us not sustained by a careful reading of the case. The question before the court was stated to be "whether a discharge of a debtor under a State insolvent law would be valid against a creditor and citizen of another State who has never voluntarily subjected himself to the State laws otherwise than by the origin of his contract," and was argued in two forms: first, as a question of international law; and, second, under the Federal Constitution. Upon the first branch of the argument, the English rule was admitted to be that "the assignment of the bankrupt's effects under a law of the country of the contract should carry the interest in his debts wherever his debtor may reside," and then it was declared to be "perfectly clear that in the United States a different doctrine has been established, and since the power to discharge the bankrupt is asserted on the same principle, with the power to assign his debts, that the departure from it in the one instance carries with it a negation of the principle altogether." At a later stage of the opinion, attention is called to the circumstances that the discharge is always and necessarily an adjudication of a court, and depends wholly upon the operative force of that adjudication; and that neither comity nor justice requires that we shall hold one of our citizens bound by a judgment of a foreign court, to which he was not a party, could not be compelled to be a party, and of which he might have had no notice. I have less hesitancy in thus asserting the error of *May v. Breed*, in construing the decision of the federal court as standing outside of international law, and so not authority in a case like this, because I observe that Mr. Redfield, in editing a new edition of *Story on the Conflict of Laws*, has deemed it necessary to criticise his author's assertion of the same error (§ 341 *a*), and more especially because the Supreme Court itself, in the later case of *Baldwin v. Hale*, *supra*, put its decision mainly upon a ground not peculiar to our federal relations, but upon the effect of a foreign judgment. This last case, also, referring to the Massachusetts doctrine "that if the contract was to be performed in the State where the discharge was obtained, it was a good defence to an action on the contract, although the plaintiff was a citizen of another State and had not, in any manner, become a party to the proceedings," expressly repudiated the conclusion, saying that, "irrespective of authority, it would be difficult, if not impossible, to sanction that doctrine."

In our own State two cases have been decided in substantial accord with the ruling of the federal court. *Gardner v. Oliver Lee & Co.'s Bank*, 11 Barb. 558; *In re Waite*, *supra*. The latter case stated the general rule without grafting upon it any exception founded upon the

origin of the contract. We are content to follow these authorities without entering into the wide and difficult discussion in which they culminated. It follows, therefore, in the present case that the foreign discharge would have been, in and of itself, no defence to the American holder of the bill. If property of the bankrupt should be found in our jurisdiction, the plaintiffs were at liberty to proceed against it by attachment and collect their debt out of such property, and the foreign bankruptcy proceedings would neither prevent nor stand in the way, for the sufficient reason that their only force in our jurisdiction comes from our consent, and we have chosen thus to limit that consent. The right remaining to the plaintiffs was a valuable right. It charged with the payment of the protested bill any present or future acquisitions of the acceptors which might come into our jurisdiction, and might result in the collection of the whole debt, or a compromise settlement induced by the desire or interest of the debtors to have access to our markets, and freedom to resume their business among us. To that right, thus valuable and material, it was the privilege of the surety to succeed, by way of subrogation, whenever he should pay the debt, and the plaintiffs could not deprive him of it or impair and destroy it, except at the peril of releasing him from his liability. Just that was what the plaintiffs did. Tempted by the compromise offered, they sought to obtain the defendant's consent to its acceptance by him. That consent he withheld, but they, acting upon their own conceptions of what was most for their interest, voluntarily submitted themselves and their rights as creditors to the foreign jurisdiction, proved their debt, and accepted the compromise decreed. The condition of the dividend was a release of the debtor. They could not take the compromise and avoid the condition, and so by their act they discharged the acceptors entirely and everywhere. That such is the effect of their voluntary submission to the foreign jurisdiction is inevitable on principle, and has been often decided. *Gardner v. Oliver Lee & Co.'s Bank*, *supra*; *Clay v. Smith*, 3 Pet. (U. S.), 411. The unavoidable consequence follows. The creditor having by his own voluntary act released the debtor from all remaining liability his surety is discharged. The courts below so held, and we think correctly.

But another suggestion has arisen among us, original with the court, and not at all urged in the brief of counsel prepared with great thoroughness and ability. That suggestion is that Borland consented to the acceptance of the dividend by plaintiffs, and so lost the right to complain; and the evidence on which this is founded is said to exist in two letters which passed between the parties. It is not pretended that plaintiffs' letter asks Borland's consent to their acceptance of the dividend, or that he, in terms, gave that consent, but such consent not directly asked or given is sought to be inferred from what was written. The letters are but the declarations of the parties bearing on the issue, and none the less so because they happen to be in writing. The proper inference to be drawn from them were questions of fact, more or less

affected by the other evidence in the case. Whether, from the language used, Borland meant to give his consent, and waive his rights, or plaintiffs understood him to consent, and acted upon that understanding, or without it, were certainly inquiries for the jury, and not for the court. But neither party asked to go to the jury upon any question of fact, and each by asking judgment in his own favor waived any possible question of fact, and conceded that only questions of law were involved. Were this otherwise, the result would not be changed. As I have said, plaintiffs did not ask Borland's consent to their proving their own claim. On the contrary, they asked him to prove his, in order that they might not be compelled to prove theirs. The plain meaning was, we ask you to prove yours; if you decline, we shall prove ours at all events. To this request, the only one made, Borland returns a refusal. That it is politely said in the phrase addressed to the counsel, "I would much prefer that your clients adopt some other course for securing to themselves dividend," means only in connection with their explicit avowal, do it yourselves, if you choose to do it at all. And then, as if fearing the very misconstruction now suggested, he adds: "I think upon the whole it may be better to leave the matter as it stands at present, rather than complicate it by assuming to be bailee of any funds they may claim as theirs. I do not aspire to the position." Unquestionably his meaning is, it is best that neither of us touch this dividend, and I, at least, refuse. Language must be misinterpreted to make this a consent, and a waiver of the surety's rights.

The judgment should be affirmed, with costs.

All concur, except EARL, J., dissenting, and RUGER, C. J., not voting.

*Judgment affirmed.*¹

IN RE MARSHALL PAPER COMPANY.

CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, JUNE 7, 1900.

[*Reported in 102 Federal Reports, 872.*]

BEFORE COLT and PUTNAM, Circuit Judges, and WEBB, District Judge.

COLT, Circuit Judge. This appeal and petition relate to two orders or decrees entered by the District Court in the matter of the Marshall Paper Company, bankrupt. 95 Fed. 419. The question raised by the appeal is whether the order of the District Court refusing to grant the petitioner a discharge was proper.

The District Court based its decision on two grounds: First, it doubted, at least in some cases, whether a corporation was entitled

¹ Gardner v. Lee, 11 Barb. 558; Third Nat. Bank v. Hastings, 134 N. Y. 501, 505, acc.

under the act to a discharge; second, it held that the court could refuse a discharge for causes other than those mentioned in section 14 of the act, and it declined to grant a discharge in the present case by reason of the injurious effect it might have upon the creditors' right to enforce the secondary liability of the directors of the corporation under the Massachusetts statute.

We think a corporation is entitled to a discharge under the bankrupt act of 1898. The provisions of the act, supplemented by its legislative history, forbid, in our opinion, any other conclusion. By section 1, par. 19, it is declared that "persons" shall include corporations, except where otherwise specified; by section 14 *a*, that any person may file an application for a discharge; and by section 4 *b*, that any corporation may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. As any person may file an application for a discharge, and as a corporation is a "person," within the meaning of the act, and entitled to the benefits of the act, it follows that a corporation is entitled to a discharge under the act.

The bankrupt act of 1867 expressly excepted corporations from the right to a discharge. Rev. St. § 5,122. This exception was retained in the earlier drafts of the present act, but it was stricken out before the act became a law. To quote from Judge Lowell's opinion in the District Court:

"Some earlier drafts of section 14 of the present act — drafts which in other respects resemble almost literally the section as passed — began with the words, 'Any person not a corporation.' See St. 1,694, 52d Cong., 1st Sess., § 50; H. R. 9,348, 52d Cong., 1st Sess., § 13; St. 1,035, 55th Cong., 2d Sess., § 13, of the substitute. See also the similar change made in drafting section 17 of the act." 95 Fed. 421.

Where a former act contains an express exception, and the first drafts of a later act relating to the same subject contain the same exception, and this exception is omitted from the act as finally enacted, and other provisions in the act are made to conform with this change, we cannot but conclude that Congress intended to make the change, and the courts should not seek to render it nugatory by a forced construction.

The bankrupt, under section 14, is entitled to a discharge as a matter of right, provided he has not committed any of the offences therein enumerated.

By this provision, the judge shall hear the application and discharge the applicant unless he is found guilty of some one of the prescribed offences. The court is not authorized to deny the application for discharge upon a ground not set forth in this section. *In re Black* (D. C.) 97 Fed. 498. A refusal to grant a discharge cannot be said to rest in the discretion of the judge. The words, "investigate the merits of the application," must be taken in connection with the context. To construe these words as if they stood alone and disconnected from what follows would be to leave the whole question of discharge in the dis-

cretion of the court. Looking at the entire section, we do not think these words will bear such a construction, however desirable it may seem to the court in a particular case to so interpret them. It seems to us that Congress in this section clearly specifies the only causes for which a discharge can be denied, and leaves to the court the sole duty of deciding, after due hearing, whether such cause exists.

When the bankrupt files his petition for a discharge, the only facts pleadable in opposition thereto are those which show that, under the provisions of section 14, he is not entitled to a discharge. In other words, it must be shown that he has committed some one of the offences described; otherwise, the judge "shall" discharge the applicant.

The right to a discharge, and the effect of a discharge, are wholly distinct propositions. The proper time and place for the determination of the effect of a discharge is when the same is pleaded or relied upon by the debtor as a defence to the enforcement of a particular claim. The issue upon the effect of a discharge cannot properly arise or be considered in determining the right to a discharge. *In re Rhutassel* (D. C.) 96 Fed. 597; *In re Thomas* (D. C.) 92 Fed. 912; *In re Mussey* (D. C.) 99 Fed. 71.

A discharge releases only the bankrupt's personal liability. In accordance with this underlying principle, section 16 of the act provides:—

"The liability of a person who is a co-debtor with, or guarantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt."

The theory of a discharge as well as this express provision of the act forbid that the secondary liability of the directors of a corporation, under the Massachusetts statute, should be affected by the corporation's discharge in bankruptcy. Such a discharge does not prevent creditors from taking judgment in the State court against the corporation in such limited form as may enable them to reap the benefit of the directors' liability. The rendering of such a judgment depends upon the authority of the State court under the local law. There is nothing in the bankrupt act to prevent it. The judgment will not be against the person or property of the bankrupt, and has no other effect than to enable the plaintiff to charge the directors in accordance with the State statute. *Hill v. Harding*, 130 U. S. 699, 702, 703, 9 Sup. Ct. 725, 32 L. Ed. 1,083.

A suit in the State court against a corporation has a double aspect. So far as it is brought against a corporation for a debt provable in bankruptcy, its discharge in bankruptcy may be pleaded as a bar. So far as it is brought to obtain a judgment against the corporation for the purpose of subsequently enforcing the secondary liability of the directors under the State statute, the discharge is no bar, and the court may render a special judgment for that purpose. *Hill v. Harding, supra*. Section 37 of the act of 1867 (Rev. St. § 5,122) expressly excluded corporations from a discharge. Under that act it was decided in New

Lamp Chimney Co. v. Ansonia Brass & Copper Co., 91 U. S. 656, 23 L. Ed. 336, that a creditor of a manufacturing corporation, which was duly adjudged a bankrupt, who has proved his claim and received a dividend thereon, does not thereby waive his right of action for so much of the claim as remains unpaid. Near the close of the opinion in that case (page 666, 91 U. S., and page 340, 23 L. Ed.) Mr. Justice Clifford, in discussing the general question of discharge in bankruptcy and the reasons therefor, observed:—

“Certificates of discharge are granted to the individual bankrupt ‘to free his faculties from the clog of his indebtedness,’ and to encourage him to start again in the business pursuits of life . . . unfettered with past misfortunes.”

As a reason why the act excluded corporations from a discharge, the opinion goes on to say:—

“Stockholders could not be held liable in such a case if the corporation is discharged, nor could the creditor recover judgment against the corporation as a necessary preliminary step to the stockholder’s individual liability.”

This general expression by the Supreme Court, which was unnecessary to the determination of the particular question before the court, because the act of 1867 expressly denied the benefit of a discharge to corporations, is not binding upon this court in another case arising under an act which entitles a corporation to a discharge.

The principle of a qualified judgment against a bankrupt after his discharge, for the sole purpose of establishing a secondary liability, which is recognized in the later case of *Hill v. Harding*, *supra*, was not discussed by Mr. Justice Clifford, because it was neither necessary nor pertinent to the determination of the questions which were raised and decided in the case then under consideration. The petitioning corporation having duly filed its application for a discharge under section 14, and not having been adjudged guilty of any of the offences therein mentioned, we are of the opinion that it was entitled to a discharge.

In the original petition, which was heard with this appeal, we are asked to revise the order of the District Court refusing to enjoin certain actions at law in the State court, under section 11 *a*, until the question of discharge is determined. As we have already determined that the bankrupt is entitled to a discharge, it becomes unnecessary to decide the point raised by the petition.

In No. 301, the decree of the District Court refusing a discharge is reversed, and that court is directed to enter a decree discharging the Marshall Paper Company, and the costs of this court are awarded to the appellant.

In No. 299, it is ordered, adjudged, and decreed that the petition be dismissed, without prejudice, and without costs.

WOOD & SELICK v. VANDERVEER.

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, DECEMBER
TERM, 1900.

[Reported in 55 New York, Appellate Division, 549.]

RUMSEY, J. This action was brought against three persons as trustees of the Tenney Company to enforce the liability imposed upon the directors of stock corporations by section 30 of the Stock Corporation Law because of the failure of the company to file the report required by that statute. The trial was had upon the issue of law raised by a demurrer of the plaintiff to the second defence set up in the answer, and the defendants had judgment with leave to the plaintiff to withdraw its demurrer. That not having been done, final judgment was entered dismissing the complaint. The appeal is from this judgment, and the notice of appeal states that the order overruling the demurrer and the interlocutory judgment will also be brought up for review. So far as the order is concerned, that cannot be reviewed because it is not a decision from which an appeal can be taken. That, however, is a matter of no importance as the statement in the notice of appeal that the interlocutory judgment will be brought up for review brings the whole case before us.

The Tenney Company, a domestic stock corporation organized under the laws of the State of New York, was on the 25th day of April, 1899, indebted to the plaintiff in the sum of \$2,228.81, being the balance due for goods sold to it by the plaintiff between the 13th day of January, 1898, and the 25th of April, 1899. The defendants were directors of the company in January, 1898, and so continued down to and after the 1st day of May, 1899. No report of the condition of the company such as is required by section 30 of the Stock Corporation Law was filed either in January, 1898, or January, 1899. None of the defendants had filed the certificate required by the statute to relieve him from the liability imposed for the failure of the company to file the report. The debt of the company to the plaintiff was fully due on the 26th day of April, 1899.

These facts are admitted by the defence, which was demurred to. The facts set up in that defence are that on the 6th day of June, 1899, the Tenney Company was adjudged a bankrupt in involuntary proceedings brought against it in the District Court of the United States for the Southern District of New York; that it offered terms of composition to its creditors, these terms being the payment of fifty per cent of its indebtedness, ten per cent in cash and the remainder in four notes due respectively in six, nine, twelve, and fifteen months from the date of the confirmation of the composition; that the composition was accepted by a majority of the creditors of the corporation and was con-

firmed on the 12th day of July, 1899, and that the Tenney Company had performed all the terms of the composition on its part. (The defence also alleged that the debt of the Tenney Company to the plaintiff was provable against that company in the bankruptcy proceedings and was one from which it could have been discharged.) The defence also contained a statement that no portion of the indebtedness against the Tenney Company alleged in the complaint was at the time of the commencement of the action or at the time of serving the answer due or unpaid.

This action was brought on the 14th day of November, 1899, while the notes given upon the composition agreement were still outstanding, unpaid and not due.

The defendants claim that it was essential to the right of the plaintiff to maintain this action that there should be a debt of the Tenney Company due and actually payable by them at the time the action was begun, and that as there had been a composition as to the debts of the company including the one to the plaintiff and the notes given under the composition agreement were not yet due, the remedy of the plaintiff upon that debt against the Tenney Company was suspended, and this action cannot be maintained until these notes are due.

It has been held that a plaintiff cannot maintain such an action as this unless three things co-exist: The default in making the report; the fact that the defendants were trustees; and a debt due from the company. *Jones v. Barlow*, 62 N. Y. 202. On the 1st day of June, 1899, all these things existed, and at that time the plaintiff had a complete cause of action against each one of the defendants upon which the Statute of Limitations had begun to run. The debt of the Tenney Company to the plaintiff which lay at the foundation of this action has never been paid, and the only question is, whether the steps which have been taken with respect to it in the bankruptcy proceedings have suspended the remedy upon it so that the right of action of the plaintiff upon it is postponed.

The composition in bankruptcy was confirmed on the 12th of July, 1899. The effect of that confirmation is prescribed by section 14 of the Bankruptcy Act, which provides that the confirmation of a composition shall discharge the bankrupt from his debts other than those agreed to be paid by the composition and those not affected by the discharge. The original debt of the company to the plaintiff came within the provisions of section 14 of the Bankruptcy Act. This debt having been discharged, the bankrupt was relieved from further liability with respect to it to Wood & Selick. What might be the result of a failure to pay any of the notes agreed to be paid by the composition it is not necessary to consider because it is alleged that the composition has been performed and the rights of the parties are, therefore, controlled by section 14 of the Bankruptcy Act, quoted above. It is to be noticed that this act differs from that of 1867, as amended in 1874, because this one contains an express provision that a confirmation of a composition

shall work a discharge of all of the debts of the bankrupt. That condition was not contained in the former law. Therefore, when that composition had been confirmed the original debt of the Tenney Company ceased to exist. It is not a case of a suspension of a remedy, but an absolute discharge of the debt. There never can be any remedy upon the original debt. The remedy of a creditor against the Tenney Company was to have payment of the composition notes, but when those notes were paid there still arose no remedy upon this original debt. So far as the creditor was concerned he had after that time no right whatever against the Tenney Company by reason of the existence of the debt which it is sought here to recover.

But the fact that there can be no recovery from the Tenney Company makes no difference with regard to the liability of these defendants. The statute does not require as a prerequisite to maintain this action against these defendants that a judgment shall have been recovered against the original debtor. The sole reason why the debt from the company must be past due before this action can be maintained is that the liability of the directors is secondary in its nature, and does not come to exist until the company has made default. Until the debt is due there is a presumption that it will be paid by the company which owes it, and until that presumption has been overthrown by the failure of the company to pay the debt there is no reason to proceed against the directors. But when that failure becomes a fact then this remedy comes to exist.

This debt of the company has never been paid, although the right to recover from the corporation has been taken away by operation of law. Does the taking away of that right affect the rights of the plaintiff to recover from the directors who are also liable for the debt?

That depends somewhat upon the nature of the liability of these directors. In a case arising under a like statute in Massachusetts it was held that the liability of a director was in the nature of a suretyship or guaranty for the original debt, and that, although the corporation had been discharged, the liability of the directors was not affected, because the statute provides that the discharge shall affect only the personal obligation of the bankrupt, and shall not in any manner affect the liability of one who is a co-debtor with, or guarantor, or in any manner a surety for the bankrupt. Bankruptcy Act, § 16; *Matter of Marshall Paper Co.*, 95 Fed. Rep. 419; s. c., 182 Fed. Rep. 872; *Hill v. Harding*, 103 U. S. 699. So that by the express provisions of the statute which works the discharge the plaintiff lost no rights against those directors if their liability is in the nature of a suretyship.

But it may be said with some plausibility that their liability is in the nature of a penalty, and so the courts have held that it is barred within three years under the provisions of subdivision 3 of section 383 of the Code of Civil Procedure as an action upon a statute for a penalty or a forfeiture. But if that be true and this be a penal action the discharge of the corporation from the debt without its payment has no effect upon the right of the plaintiff to recover from these defendants. This cause

of action is created by the statute. It is operative when the debt becomes payable, and regarding it as a penal action the amount of the debt is simply the measure of damages which the plaintiff is entitled to recover because of the liability imposed upon these persons by the law.

After the debt has become due, the creditors are not limited to an action against the corporation to recover it, nor is it necessary that they should begin such an action unless they see fit to do so. They can at once proceed against the directors, and can only be barred from that action by the payment of the debt by the corporation. Indeed, no reason is seen why they may not at the same time maintain an action against the corporation upon its contract liability, and another against the directors for their statute liability, although undoubtedly if judgment were recovered in both actions the payment of one would work a satisfaction of the other. But the second action is entirely separate, and has no connection with the other; and as the defendants here were not parties to the bankruptcy proceedings, and their liability was not in any way questioned in these proceedings, it is clear that the discharge of the bankrupt, which affected it only and was personal to it alone, can have no effect whatever upon the right of the plaintiff to recover against another person whose liability for this debt is created by statute, and is entirely independent and separate from the cause of action against the company.

For these reasons we think that the conclusion of the learned justice in the court below was not correct, and both the final judgment and the interlocutory judgment must be reversed, with costs, and the demurrer sustained, with costs in this court and in the court below, with leave to the defendants to amend their answer in twenty days on payment of such costs.

PATTERSON, INGRAHAM, and HATCH, JJ., concurred; VAN BRUNT, P. J., dissented.

VAN BRUNT, P. J. (dissenting). If the trustee paid the debt he would have the right to be subrogated to the plaintiff in his claim against the company which is the foundation of the recovery. In the case at bar there is no debt which can presently be enforced against the company.

I dissent therefore.

Judgment reversed, with costs, and demurrer sustained, with costs in this court and in the court below, with leave to defendants to amend answer in twenty days on payment of such costs.¹

¹ *Mohr v. Minnesota Elevator Co.*, 40 Minn. 343, *contra*.

BOYNTON v. BALL.

SUPREME COURT OF THE UNITED STATES, APRIL 4-25, 1887.

[*Reported in 121 United States, 457.*]

MR. JUSTICE MILLER delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Illinois. The question of federal law, which gives jurisdiction to this court to review the judgment of the State court, arises out of the refusal of that court to give effect to a certificate of discharge in bankruptcy to Boynton, the plaintiff in error.

Ball, the defendant in error, brought suit against Boynton in the Circuit Court of the State of Illinois for Stephenson County, on April 16, 1877. To this Boynton filed his answer April 4, 1878, and judgment was rendered against him on December 9, 1879, for \$6,223.99 debt, and \$5,234.99 damages and costs. Pending this suit in the State court Boynton, on his own application, was declared a bankrupt April 15, 1878, and received his discharge from all his debts, December 23, 1880. An execution on the judgment against Boynton in the State court was issued February 21, 1880, and returned unsatisfied. On March 25, 1881, Boynton filed a petition in the State court, asking for a perpetual stay of execution on the judgment rendered in favor of Ball, and filed a certified copy of his discharge in bankruptcy, together with certain affidavits. Ball was served with notice of this motion and appeared and made defence. The motion was overruled by the Circuit Court, from which ruling Boynton appealed to the Supreme Court of the State, which court affirmed the judgment of the court below with costs. 105 Ill. 627.

The question presented for us to consider is, whether the discharge in bankruptcy was, under the circumstances of this case, a discharge from the judgment rendered in the Circuit Court of Stephenson County while the proceedings in bankruptcy were pending. It will be perceived that the suit in the State court was commenced before the proceedings in bankruptcy in which the discharge was finally granted. It will also be perceived that the case lingered in the State court from April 16, 1877, until December 9, 1879, when the final judgment was rendered, a period of over two years, but that the plaintiff in error did not obtain his final discharge in bankruptcy until December 23, 1880, which was more than a year after the judgment was obtained against him in the State court.

In *Dimock v. The Revere Copper Co.*, 117 U. S. 559, decided at the last term of this court, a case very similar to this was presented to us for our consideration. Dimock, being sued in the State court of Massachusetts, made defence, and pending the action was discharged from all his debts under bankruptcy proceedings, receiving his certificate of discharge as

a bankrupt a few days before final judgment against him in the State court. Notwithstanding he had this discharge at the time the judgment was rendered against him in the State court, he did not plead it in bar of that action nor bring it in any manner to the attention of the court. He was afterwards sued upon this judgment in the Supreme Court of the State of New York, and there pleaded his discharge in bankruptcy in bar of the action. That court, however, held the certificate of discharge not to be a bar, and rendered judgment against him. This judgment was reversed in the Supreme Court, in General Term, and that judgment was in turn reversed by the Court of Appeals, which restored the judgment of the court in Special Term. This court, in reviewing that judgment, said that the Superior Court of Massachusetts, in which the first suit was brought, had jurisdiction of the case, which was rendered complete by the service of process and the appearance of the defendant; that nothing that was done in the bankruptcy court had ousted the jurisdiction of that court, which, accordingly, proceeded in due order to judgment; that this judgment having been rendered after the certificate of discharge in bankruptcy which had not been called to the attention of the court in any manner, nor any stay of proceedings in the State court asked on account of the pendency of the bankruptcy proceedings, the question before the Massachusetts court for decision at the time it rendered judgment was, whether Dimock was then indebted to the Revere Copper Company, and we held that it had jurisdiction and rightfully rendered judgment on this question in favor of that company, notwithstanding the proceedings in the bankruptcy court of which it could take judicial notice. This decision was supported by references to cases heretofore decided involving similar questions in this court and in the courts of the States.¹

The principle on which the case was decided was that, while the discharge in bankruptcy would have been a valid defence to the suit if pleaded at or before the time of judgment was rendered in the Massachusetts court, it had in that respect no more sanctity or effect in relieving Dimock of his debt to the company than a payment, or a receipt, or a release, of which he was bound to avail himself by plea or suggestion of some kind as a defence to the action in proper time; that, showing no good reason why he should not have presented that discharge, and permitting the judgment to go against him in the Massachusetts court, without an attempt to avail himself of it there, the judgment of that court was conclusive on the question of his indebtedness at that time to the copper company. That case, so parallel in its circumstances to the one now before us, would be conclusive of the latter if Boynton had had his certificate of discharge, or if the order for it had been made by the bankruptcy court before the judgment in the State court. But, as we have already seen, the judgment in the

¹ *Re Tooker*, 14 B. R. 35; *Bradford v. Rice*, 102 Mass. 472; *Hollister v. Abbott*, 31 N. H. 442; *Whyte v. McGovern*, 51 N. J. L. 356; *Steward v. Green*, 11 Paigo, 535; *Miller v. Clements*, 54 Tex. 351, *acc.*

State court was rendered more than a year before the order of discharge in the bankruptcy court, and Boynton therefore had no opportunity to plead a discharge which had not then been granted, as a defence to that action.

Two propositions are advanced by counsel for the defendant in error, in support of the judgment of the Supreme Court of Illinois, as reasons why the certificate obtained so long after the judgment in the State court should not have the effect of a discharge of the debt evidenced by that judgment. The first of these is, that the original debt on which the action was brought in the Circuit Court of Stephenson County no longer exists, but that it was merged in the judgment of that court against Boynton, and was therefore not released under the act of Congress, which declares that all debts provable against the estate of the bankrupt at the time bankruptcy proceedings were initiated shall be satisfied by the order of the court discharging the bankrupt. The argument is, that the judgment now existing against Boynton is not the debt that existed at the time bankruptcy proceedings were initiated; that by the change of the character of the debt from an ordinary claim or obligation to a judgment of a court of record it ceased to be the same debt and became a new and different debt as of the date of the judgment. Some authorities are cited for this general proposition of a change of the character of the debt by merger into the judgment, and some authorities are also cited by counsel for plaintiff in error to the contrary. See Judge Blatchford, *In re Brown*, 5 Ben. 1; *In re Rosey*, 6 Ben. 507.

But this court, to which this precise question is now presented for the first time, is clearly of opinion that the debt on which this judgment was rendered is the same debt that it was before; that, notwithstanding the change in its form from that of a simple contract debt, or unliquidated claim, or whatever its character may have been, by merger into a judgment of a court of record, it still remains the same debt on which the action was brought in the State court and the existence of which was provable in bankruptcy.

The next proposition is, that under section 5,106 of the Revised Statutes of the United States it was the duty of Boynton to make application to the State court, before judgment in that court, to have the proceedings there stayed, to await the determination of the court in bankruptcy on the question of his discharge. That section is in the following language:—

“No creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge; and provided, also, that if the amount due the

creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due, which amount may be proved in bankruptcy, but execution shall be stayed."

This cannot be construed to mean anything more than that where the bankruptcy proceedings are brought to the attention of the court in which a suit is being prosecuted against a bankrupt, that court shall not proceed to final judgment until the question of his discharge shall have been determined. The State court could not know or take judicial notice of the proceedings in bankruptcy unless they were brought before it in some appropriate manner, and the provisions of this section show plainly that it does not thereupon lose jurisdiction of the case, but the proceedings may, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of his discharge. Even the direction that it shall be stayed is coupled with a condition that "there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge;" and with the further provision that "if the amount due the creditor is in dispute, the suit, by leave of the court in bankruptcy, may proceed to judgment for the purpose of ascertaining the amount due."

These provisions exclude altogether the idea that the State court has lost jurisdiction of the case, even when the bankrupt shall have made application showing the proceedings against him. The whole section is also clearly impressed with the idea that this is a provision primarily for the benefit of the bankrupt, that he may be enabled to avoid being harassed in both courts at the same time with regard to such debt. It is therefore a right which he may waive. He may be willing that the suit shall proceed in the State court for many reasons; first, because he is not sure that he will ever obtain his discharge from the court in bankruptcy, in which case it would do him no good to delay the proceedings at his expense in the State court; in the second place, he may have a defence in the State court which he is quite willing to rely upon there, and to have the issue tried; in the third place, he may be very willing to have the amount in dispute liquidated in that proceeding, in which case it becomes a debt to be paid pro rata with his other debts by the assignee in bankruptcy.

If for any of these reasons, or for others, he permits the case to proceed to judgment in the State court, by failing to procure a stay of proceedings under the provisions of this section of the bankrupt law, or the assignee in bankruptcy does not intervene, as he may do, *Hill v. Harding*, 107 U. S. 631, he does not thereby forfeit his right to plead his final discharge in bankruptcy, if he shall obtain it, at any appropriate stage of the proceedings against him in the State court. And if, as in the present case, his final discharge is not obtained until after judgment has been rendered against him in the State court, he may produce that discharge to the State court and obtain the stay of execution which he asks for now. See *McDougald v. Reid*, 5 Ala. 810.

In *Rogers v. The Western Marine and Fire Ins. Co.*, 1 La. Ann. 161, the court, in a similar case, says: "The proposition that Rogers should have pleaded the pendency of the bankrupt proceedings in the original suit, and cannot disturb the execution of the judgment which is final, is untenable. The discharge in bankruptcy was posterior to the rendition of this judgment, and operated with the same force upon the debt after it assumed the form of a judgment as it would have done had the debt remained in its original form of a promissory note."

These and many other decisions under the bankrupt law of 1841 are to be found in the brief of the plaintiff in error. The same principle is decided in *Cornell v. Dakin*, 38 N. Y. 253, and in several cases in the District and Circuit Courts of the United States. There is a very able review of the subject by Judge Hillyer of the United States District Court of Nevada, in the case of *Stansfield*, reported in 4 Sawyer, 334.

The same thing was held by the Court of Appeals of New York, in *Palmer v. Hussey*, 87 N. Y. 303, 310, which was affirmed in this court on writ of error in *Palmer v. Hussey*, 119 U. S. 96.

It follows from these considerations that

*The Supreme Court of Illinois was in error in failing to give due effect to Boynton's discharge in bankruptcy, and its judgment is reversed, and the case is remanded to that court for further proceedings in accordance with this opinion.*¹

¹ "The early English practice gave the creditor an election to prove in bankruptcy or prosecute his action; and if he obtained judgment and execution, he could dispute the validity of the proceedings in bankruptcy by seizing the property in the hands of the assignees,—a practice which led to a vast amount of litigation and uncertainty. He might, instead of seizing property, take the debtor in execution. But it was enacted, as early as 1730, that if a creditor did obtain such a judgment and take the debtor in execution, or detain him in prison, after he had received his certificate, he should be discharged on motion. Stat. 5 Geo. II. ch. 30, § 13. And this was continued in force until 1869. The English practice has had an undue weight in some of the decisions in this country. See the arguments in *Dresser v. Brooks*, 3 Barb. 429. The law was so in England; but it was the statute itself which provided for the case, and not any general rule in bankruptcy. It is easy to see, by studying the English cases, that this practice was established by statute to meet the very difficulty which our statute meets by granting a stay of actions until the question of discharge is determined. The statute of 1869 will work an entire change of the practice in England, and bring it to the true position. It gives the court of bankruptcy full power to stay actions; and no summary motion will hereafter be made, nor any judgment be obtained in that country, excepting such as will not be discharged by the certificate." *Re Gallison*, 2 Low. 72, 74. The English Act of 1883, section 10 (2), gives the bankruptcy court power to stay any action, execution, or other legal process against the bankrupt at any time after the presentation of a bankruptcy petition.

Under the United States Acts of 1841 and 1867 the law was in conflict prior to the decision of *Boynton v. Ball*. In accord with that decision were *Re Brown*, 5 Ben. 1; *Anderson v. Anderson*, 65 Ga. 518 (*conf.* *Adams v. Dickson*, 72 Ga. 846); *Rogers v. Western Ins. Co.*, 1 La. Ann. 161; *McDonald v. Ingraham*, 30 Miss. 389; *Dresser v. Brooks*, 3 Barb. 429; *Fox v. Woodruff*, 9 Barb. 498; *Johnson v. Fitzhugh*, 3 Barb. Ch. 360; *Clark v. Rowling*, 3 N. Y. 216; *McDonald v. Davis*, 105 N. Y. 508; *Dawson v. Hartsfield*, 79 N. C. 334; *Dick v. Powell*, 2 Swan, 632; *Stratton v. Perry*, 2 Tenn.

KINMOUTH v. BRAEUTIGAM.

SUPREME COURT OF NEW JERSEY, JUNE 12, 1900.

[*Reported in 46 Atlantic Reporter, 769.*]

THIS action was begun on October 29, 1898. A voluntary petition in bankruptcy was filed by the defendant on November 23, 1898. The plaintiff recovered judgment on December 27, 1898, and on January 12, 1899, the plaintiff was adjudicated a bankrupt. The plaintiff now moved to vacate the judgment.

COLLINS, J. This motion was heard by me in vacation, under section 295 of the practice act. It involves the interpretation of the following provisions of the United States bankrupt act of 1898, viz.:

[The court here quoted section 1 (1) and section 67 f.]

It is argued on behalf of the motion that the words, "at any time within four months prior to the filing of a petition in bankruptcy," mean at any time after a date that is four months prior to the filing of the petition, even although the lien is obtained subsequent to such filing. I cannot assent to this construction. The words are perfectly plain, and have no inclusion of a judgment obtained after the filing of the petition. The way to prevent judgment in a pending action is to stay the suit until the adjudication in bankruptcy, and a sufficient time afterwards to afford opportunity to obtain and plead a discharge. Possibly, if default be made, the court will, upon discharge being granted, open the judgment in order to allow it to be pleaded; but it will not vacate a judgment regularly obtained, because of the possibility of a subsequent discharge. It should be added that the avoiding of a judgment, under the quoted provision, is not matter of right. Judicial

Ch. 633; *Harrington v. McNaughton*, 20 Vt. 293; *Stockwell v. Woodward*, 52 Vt. 228, 234. See also *Imlay v. Carpentier*, 14 Cal. 173; *Betts v. Bagley*, 12 Pick. 572; *Wyman v. Mitchell*, 1 Cow. 316. Contrary decisions were *Re Gallison*, 2 Low. 72; *Re Williams*, 2 B. R. 229; *Re Crawford*, 3 B. R. 698; *Re Mansfield*, 6 B. R. 388; *Roden v. Jaco*, 17 Ala. 344 (*conf.* *Trimble v. Williamson*, 49 Ala. 525, 528); *Steadman v. Lee*, 61 Ga. 58; (*conf.* *Anderson v. Anderson*, 65 Ga. 518; *Adams v. Dickson*, 72 Ga. 846); *Boynton v. Ball*, 105 Ill. 627; *Bowen v. Eichel*, 91 Ind. 22; *Holbrook v. Foss*, 27 Me. 441; *Pike v. McDonald*, 32 Me. 418; *Uran v. Houdlette*, 36 Me. 15; *Palmer v. Merrill*, 57 Me. 26; *Woodbury v. Perkins*, 5 Cush. 86; *Bradford v. Rice*, 102 Mass. 472; *Cutter v. Evans*, 115 Mass. 27; *McCarthy v. Goodwin*, 8 Mo. App. 380; *Kellogg v. Schuyler*, 2 Denio, 73; *Wise's Appeal*, 99 Pa. 193.

The decision of *Boynton v. Ball* fixed the law, and it has been followed in *Re Marshall Paper Co.*, 95 Fed. Rep. 419, 424; *Tefft v. Knox*, 37 Kan. 37; *Pine Hill Coal Co. v. Harris Co.*, 86 Ky. 421; *Huntington v. Saunders*, 166 Mass. 92; *Williams v. Humphreys*, 50 N. J. L. 500; *Whyte v. McGovern*, 51 N. J. L. 356; *Locheimer v. Stewart*, 91 Tenn. 385; *Courtney v. Beale*, 84 Va. 692; *Zumbro v. Stump*, 38 W. Va. 325.

Section 63 (5) of the Act of 1898 is evidently intended to prevent any question as to what judgments recovered after bankruptcy are provable and discharged. See *Re Marshall Paper Co.*, 95 Fed. Rep. 419, 424.

discretion is to be invoked, and the trustee in bankruptcy has a right to be heard. It may be, further, that the administering of the relief to be accorded is exclusively with the federal court having cognizance of the bankruptcy proceeding, and that that court, not the court in which judgment is rendered, is the one to "deem" the judgment null and void, or preserve it for the trustee. The motion is denied, with costs.

HENNEQUIN v. CLEWS.

SUPREME COURT OF THE UNITED STATES, MARCH 13-MAY 15, 1884.

[*Reported in 111 United States, 676.*]

IN October, 1871, Henry Clews & Co. opened a line of credit on their London house of Clews, Habicht & Co., for £6,000 in favor of Hennequin & Co., a firm doing business in New York and Paris, authorizing the latter to draw from time to time bills of exchange on the London house at ninety days from date, with the privilege of renewal, it being agreed that Hennequin & Co. should remit to Clews, Habicht & Co., a few days before the maturity of each bill, the necessary funds to meet and pay the same, so that Clews, Habicht & Co. should not have to advance any money to pay it. In consideration of such accommodation acceptances, Hennequin & Co. deposited with Clews & Co. certain collateral securities, for the purpose of securing them, in case Hennequin & Co. failed to remit the requisite funds to pay the said bills of exchange, amongst which collaterals were twenty-nine Toledo railroad mortgage bonds, for £1,000 each. Clews & Co. used the said bonds by depositing them with third parties as collateral security to raise money for their own purposes, although not called upon to make any advances to pay the bills of Hennequin & Co., all of which were protected and paid according to agreement. After the bills were all retired, Hennequin & Co. demanded a return of the collaterals; but Clews & Co. having failed in business, did not return them. Thereupon, to recover the bonds, or their value, and damages, this suit was brought in the Superior Court of New York City by Hennequin & Co. against Clews & Co. and the parties with whom they had deposited the bonds. The suit was dismissed as to the latter parties, and Clews & Co., amongst other things, pleaded that on the 18th of November, 1874, they were adjudged bankrupts under the laws of the United States, and that a trustee was appointed, who succeeded to all their interest in said securities; and by a supplemental answer, filed afterward, they pleaded their discharge in bankruptcy. The following is a copy of the substantial part of this answer, namely:

"The supplemental answer as amended of the defendants Henry Clews and Theodore S. Fowler to the complaint in this action, served

by leave of the court first had and obtained, shows to the court that subsequent to the service of the original answer herein, in pursuance of the bankruptcy proceedings mentioned in said answer and the order of the court of bankruptcy, the District Court of the United States for the Southern District of New York, sitting as a court of bankruptcy, did make an order and grant to said defendants certificates of discharge under seal of said court on the 24th day of December, 1875, discharging the above-named defendants and each of them from all debts and claims which by the Revised Statutes, title Bankruptcy, are made provable against the estate of said defendants which existed on the 18th day of November, 1874, excepting such debts, if any, as are by said law excepted from the operation of a discharge in bankruptcy. . . . And the defendants further allege that the claim and indebtedness set forth in the plaintiffs' complaint herein, is one that was discharged by the operation of said bankruptcy discharge, and was provable in said bankruptcy proceedings, and was not one which was exempt from the operation of the bankruptcy statutes."

Copies of the certificates of discharge were annexed to the answer.

The parties thereupon went to trial, and the facts disclosed by the evidence were substantially in accordance with the above statement. The certificates of discharge of the defendants were given in evidence under objections; and the plaintiff asked to go to the jury on the question, as to whether the debt was created by fraud, and also on the question whether it was a debt created by the defendants while acting in a fiduciary character; both of which requests were refused, and the court directed the jury to render a verdict for the defendants; to all which rulings and directions plaintiffs duly excepted. Judgment being entered for the defendant, the plaintiffs appealed to the Court of Appeals of New York, which affirmed the judgment, and remitted the record to the Superior Court. The plaintiffs sued out this writ of error.

Mr. *C. Bainbridge Smith*, for plaintiff in error.

Mr. *William A. Abbott*, for defendant in error.

Mr. Justice BRADLEY delivered the opinion of the court. He stated the facts in the foregoing language, and continued:—

We have to decide the question, whether a discharge in bankruptcy under the act of 1867 operates to discharge the bankrupt from a debt or obligation which arises from his appropriating to his own use collateral securities deposited with him as security for the payment of money or the performance of a duty, and his failure or refusal to return the same after the money has been paid or the duty performed? or, whether a debt or obligation thus incurred is within the meaning of the 33d section of said act § 5,117 Rev. Stat., which declares that "no debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act?" The New York courts decided that the effect of the discharge in bankruptcy was to discharge the

debt, holding that the debt was not created by fraud, nor by embezzlement, nor whilst the bankrupt was acting in a fiduciary character.

The question first came up for discussion in the case upon an order for arresting the defendants, on a charge that the debt was fraudulently contracted. After obtaining their discharge in bankruptcy, the defendants moved to vacate the order of arrest, which motion the Superior Court denied; but the Court of Appeals reversed this judgment, and granted the motion. The opinion of the court on this occasion is reported in 77 N. Y. 427, and was referred to as the ground of judgment when the case finally came up on its merits.

The question, so far as relates to the principle involved, is not a new one. It came up for consideration under the bankrupt act of 1841, which withheld the benefits of the act from all debts "created by the bankrupt in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity:" 5 Stat. 441, § 1; and which further declared (amongst other things) that no person should be entitled to a discharge who should "apply trust funds to his own use." *Ib.* § 4. In the case of *Chapman v. Forsyth*, 2 How. 202, these clauses were brought before this court for examination. The case was an action of assumpsit for the proceeds of 150 bales of cotton shipped to and sold by the defendants as brokers or factors of the plaintiff. One of the defendants pleaded a discharge in bankruptcy, and the judges of the Circuit Court were divided in opinion on the question whether a commission merchant or factor, who sells for others, is indebted in a fiduciary capacity within the act, if he withholds the money received for property sold by him, and if the property is sold, and the money received on the owner's account. The opinion of this court was delivered by Mr. Justice McLean, and the above question was answered in the following terms: "If the act embrace such a debt, it will be difficult to limit its application. It must include all debts arising from agencies; and, indeed, all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country, confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the first section of the act. The cases enumerated, 'the defalcation of a public officer,' 'executor,' 'administrator,' 'guardian,' or 'trustee,' are not cases of implied, but special trusts, and the 'other fiduciary capacity' mentioned, must mean the same class of trusts. The act speaks of technical trusts, and not those which the law implies from the contract. A factor is not, therefore, within the act. This view is strengthened, and, indeed, made conclusive by the provision of the fourth section, which declares that no 'merchant, banker, factor, broker, underwriter, or marine insurer,' shall be entitled to a discharge, 'who has not kept proper books of accounts.' In answer to the second question, then,

we say, that a factor, who owes his principal money received on the sale of his goods, is not a fiduciary debtor within the meaning of the act.

This decision was, of course, authoritative; it was not only followed, but approved by the highest courts of several of the States. In *Hayman v. Pond*, 7 Metc. (Mass.) 328, the Supreme Court of Massachusetts, speaking through Chief Justice Shaw, after referring to the decision in *Chapman v. Forsyth*, said: "We have no doubt that this is the true construction of the law." In *Austill v. Crawford*, 7 Ala. 335, and in *Commercial Bank v. Buckner*, 2 La. Ann. 1023, the same views were expressed, though the contrary was held in *Matteson v. Kellogg*, 15 Ill. 547, and in *Flagg v. Ely*, 1 Edmonds, N. Y. Select Cas. 206.

Under the act of 1867 a series of diverse rulings by different courts arose on the subject; one class treating agents, factors, commission merchants, &c., as acting in a fiduciary character under the act, on the view that the act was conceived in broader and more general terms than the act of 1841; the other class taking the view that the act of 1867 used the phrase, "acting in any fiduciary character," in the sense which it had received by construction in the act of 1841. The cases on both sides of the question are collected in Bump's Law of Bankruptcy, under section 83 of the original Bankrupt Act of 1867, section 5,117 of the Revised Statutes, pp. 742-745, 10th edition. Those taking the first view are *In re Seymour*, 1 Ben. 348; *In re Kimball*, 2 Ben. 554; s. c. 6 Blatch. 292; *Whitaker v. Chapman*, 3 Lans. 155; *Lemcke v. Booth*, 47 Mo. 385; *Gray v. Farran*, 2 Cincin. Sup. Ct. 226; *Treadwell v. Holloway*, 12 Bank. Reg. 61; *Meader v. Sharp*, 54 Geo. 125; s. c. 14 Bank. Reg. 492; *Benning v. Bleakley*, 27 La. Ann. 257. Those taking the other view are *Woolsey v. Cade*, 15 Bank. Reg. 238; *Owsley v. Cobin*, Ib. 489; *Cronan v. Cotting*, 104 Mass. 245. We have examined these cases, and others bearing on the subject, but do not deem it necessary to refer to them more particularly, inasmuch as the question has recently been fully considered by this court, and the decision in *Chapman v. Forsyth* has been followed.

We refer to the case of *Neal v. Clark*, 95 U. S. 704, reversing the decision of the Court of Appeals of Virginia in *Jones v. Clark*, 25 Gratt. 642. This case involved the meaning and application of the word "fraud," in the clause under consideration,—"no debt created by fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged," &c. An executor sold certain bonds which he had received on the sale of the property belonging to the estate, the proceeds of which the will directed him to distribute in a certain way. The sale of the bonds was held by the State court to have been a misappropriation of them, amounting to a *devastavit*, in which Neal, the purchaser, was held to be a participant and liable to account for the value of the bonds

purchased; not because he was guilty of any actual fraud, but because, in view of the circumstances attending his purchase, he had committed constructive fraud. Neal had in the meantime obtained his discharge in bankruptcy, which he pleaded in bar to a recovery against him; but the State court held that "fraud," in the 33d section of the bankrupt act (of 1867) included both constructive and actual fraud, and overruled his plea. We reversed the judgment of the State court on this point, and decided that Neal was entitled, under the circumstances of the case, to the benefit of his discharge in bankruptcy. Adopting and applying the reasoning of the court in *Chapman v. Forsyth*, we said, "that in the section of the law of 1867 which sets forth the classes of debts which are exempted from the operation of a discharge in bankruptcy, debts created by 'fraud' are associated directly with debts created by 'embezzlement.' Such association justifies, if it does not imperatively require, the conclusion that the 'fraud' referred to in that section means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, as does embezzlement; and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality."

The question came before us again in *Wolf v. Stix*, 90 U. S. 1, in which a sale of goods to Wolf by an insolvent firm was set aside as fraudulent against creditors, and Wolf and his sureties were then sued on the bond given by him for a return of the goods when attached at the commencement of the proceedings. Wolf having in the meantime become bankrupt, and obtained his discharge, pleaded the same in bar of the action. We held the plea to be a good one to the action on the bond.

The present case is not precisely like either that of *Chapman v. Forsyth* or *Neal v. Clark*; but is very difficult to distinguish it, in principle, from the cases of commission merchants and factors failing to account for the proceeds of property committed to them for sale. There is no more — there is not so much — of the character of trustee, in one who holds collateral securities for a debt, as in one who receives money from the sale of his principal's property — money which belongs to his principal alone, and not to him, and which it is his duty to turn over to his principal without delay. The creditor who holds a collateral, holds it for his own benefit under contract. He is in no sense a trustee. His contract binds him to return it when its purpose as security is fulfilled; but if he fails to do so, it is only a breach of contract, and not a breach of trust. A mortgagee in possession is bound by contract, implied if not expressed, to deliver up possession of the mortgaged premises when his debt is satisfied; but he is not regarded as guilty of breach of trust if he neglects or refuses to do so, but only of a breach of contract.

The English authorities are more in accord with the decisions in this country which take a different view from our own on this question. The Debtor's Act of 1869, 32 & 33 Vict., ch. 62, abolished imprison-

ment for debt, except in the case of statutory penalties, and when arising from the default of a trustee or person acting in a fiduciary capacity, who has been ordered by a court of equity to pay money in his possession or under his control; and except defaults of attorneys and solicitors, and some other special delinquents. The Bankrupt Act of the same date, 32 & 33 Vict., ch. 71, declares that the order of discharge of a bankrupt shall not release him from any debt or liability incurred or forborne by means of any *fraud or breach of trust*. Section 49. Under these statutes, where an agent failed to pay over moneys collected for his principal, Sir George Jessel said, "no doubt this debt was incurred by fraud." *Pashler v. Vincent*, 8 Chan. Div. 825. The same doctrine was held in *Marris v. Ingram*, 13 Chan. Div. 838, where a son was in the management of his father's farm, and sold part of the stock and received the proceeds. After his father's death, being ordered to pay over the money, and failing to do so, he was held to be a person acting in a fiduciary capacity. In *Middleton v. Chichester*, 19 Weekly Reporter, 369, Lord Hatherly said that "the exceptions [in the Debtor's Act] are all referable, not to debts payable *simpliciter*, but to debts contracted in a manner in some degree subject to observation as being worthy of being treated with punishment. . . . In every case we find some shade of misconduct; something of the character of delinquency, though varying in description."

For other English cases arising under the acts referred to, see *Ex parte Wood*, *Re Chapman*, 21 W. R. 71; *Ex parte Hooson*, 21 W. R. 152; s. c. L. R. 8 Ch. 231; *Cobham v. Dalton*, L. R. 10 Ch. 655; *In re Deere*, Atty., Ib. 658; *Ex parte Halford*, *In re Jacobs*, L. R. 19 Eq. 436; *Phosphate Co. v. Hartmount*, 25 W. R. 743; *Earl of Lewes v. Barnett*, 6 Ch. Div. 252; *Barrett v. Hammond*, 10 Ch. Div. 285; *Ex parte Hemming*, *In re Chatterton*, 13 Ch. Div. 163; *Fisher's Dig. Supp.* by Chitty, tit. Debtor's Act, Col. 1287.

It is evident that the English courts regard many transactions as frauds or breaches of trust under their statutes, which we do not hold to be such under our bankrupt acts. Perhaps the liberal construction made in favor of the certificate of discharge in this country is due to the peculiar modes and habits of business prevailing amongst our people. It is, no doubt, true, as said in *Chapman v. Forsyth*, that a construction of the excepting clauses which would make them include debts arising from agencies and the like, would leave but few debts on which the law would operate. At all events, we think that the previous decisions of this court, and of the State courts in the same direction, accord with the true spirit and meaning of the act of Congress, and with the necessities of our business conditions and arrangements.

The judgment of the Court of Appeals of the State of New York is
*Affirmed.*¹

¹ *Strang v. Bradner*, 114 U. S. 559; *Palmer v. Hussey*, 119 U. S. 96; *Noble v. Hammond*, 129 U. S. 69; *Upshur v. Briscoe*, 138 U. S. 365; *Re Smith*, 9 Ben. 494; *Woolsey v. Cade*, 15 B. R. 238; *Owsley v. Cobin*, 15 B. R. 489; *Georgia R. R. v.*

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HARGADINE-MCKITTRICK DRY GOODS CO. v. HUDSON.

CIRCUIT COURT FOR THE EASTERN DISTRICT OF MISSOURI,
OCTOBER 24, 1901.

[Reported in 111 Federal Reporter, 361.]

ROGERS, District Judge. This is an action of debt on a judgment rendered in a State court in Texas. The defendant pleads his discharge in bankruptcy granted in the District Court of the United States for the District of Colorado, of which State he was at the time of filing his petition and at the time of his discharge a citizen and resident. The plaintiff replies, saying that it has no information, sufficient to form a belief, whether or not the defendant was ever a citizen of the State of Colorado, or resident of the city of Denver, in said State, or whether the defendant was duly adjudged a bankrupt in the District Court of the United States in the District of Colorado, or that said court ever had jurisdiction over the defendant, or that, thereafter, to wit, on the 17th day of April, 1900, defendant was duly discharged, by order of that court entered of record, from the payment of all debts provable against his estate on the 26th day of January, 1900, and therefore denies said allegations in defendant's answer. For a second reply the plaintiff alleges that it presented its claim for the amount of the judgment sued on to the referee in bankruptcy of the District Court of the United States for the District of Colorado, and the same was disallowed by the referee because it was barred by the statute of limitations of that State; that an appeal was had to the District Court, and the opinion of the referee was confirmed, and said claim was disallowed; that, when such action was had whereby said claim was disallowed, said judgment was not barred by the statute of limitations either in the State of Texas or in the State of Missouri. And for a third reply defendant says that the debt which was the foundation of the judgment sued on in this case was created by the fraud of the defendant, and sets out the facts constituting the fraud. The motion in this case is to strike out the second and third pleas.

The real question involved in this case is whether or not the discharge in bankruptcy operated as a release of the defendant from the judgment

Cubbedge, 75 Ga. 321; Phillips v. Russell, 42 Mo. 360; Green v. Chilton, 57 Miss. 598; Cronan v. Cotting, 104 Mass. 245; Bryant v. Kinyon (Mich.), 86 N. W. 531; Mulock v. Byrnes, 129 N. Y. 23; Pankey v. Nolan, 6 Humph. 154; Slayton v. Wells, 66 Vt. 62. The contrary decisions must be regarded as discredited. *Re Seymour*, 1 B. R. 29; *Re Kimball*, 2 B. R. 204, 354; *Treadwell v. Holloway*, 46 Cal. 547; *Herrlich v. McDonald*, 80 Cal. 479; *Jones v. Russell*, 44 Ga. 460; *Johnson v. Worden*, 47 Vt. 457; *Darling v. Woodward*, 54 Vt. 101; *Hammond v. Noble*, 57 Vt. 199 (reversed, 129 U. S. 69). See also *Mayberry v. Cook*, 121 Cal. 588; *Raphael v. Mullen*, 171 Mass. 111.

sued on. It was conceded in argument, and it affirmatively appears by the last paragraph of the reply preceding the prayer thereof, that the judgment sued on was obtained upon promissory notes, and was not in an action for fraud. The question, in the opinion of the court, turns upon the peculiar language of the statute. It is well enough to compare the provisions of the present bankrupt law with the provisions of the bankrupt law of 1867. [The court here quoted sections 5,117, 5,118, 5,119 of the Revised Statutes, and section 17 *a* of the Bankruptcy Act of 1898.]

The difference in the language is striking. Under the old law "no debt created by the fraud or embezzlement of the bankrupt" was discharged by the proceedings in bankruptcy, but in the present act it is "judgments in actions for fraud, or obtaining property by false pretences or false representations or for wilful and malicious injuries to the person and property of another," which are not released by the discharge in bankruptcy. There is no pretence that the action in which judgment was rendered was an action for fraud. It was a simple action upon a promissory note. The legislature had some object in view in making this change. It is presumed to have known what the old law was upon the subject, and to have legislated with reference thereto. Its object, therefore, must have been to change the law in this respect. There are two canons of construction which can never be overlooked: Primarily, the effort is to get at the intent of the legislature; and, secondly, in doing so, the whole act must be construed so as that every word thereof shall have its appropriate meaning. To say that an action on a promissory note, in the usual and ordinary form, is an action for fraud, is not tenable. Where a note is founded in fraud, two remedies exist. The holder may waive the contract and sue for the fraud, or he may sue upon the note and waive the fraud. The plaintiff in this case chose the latter course, and took its judgments on the notes. Under this statute it must be bound by that record, and cannot go back of it. The motion, therefore, to strike out, should be sustained. *In re Rhutassel*, (D. C.) 96 Fed. 597; *In re Blumberg*, 1 Am. Bankr. R. 633, 94 Fed. 476; *Coll. Bankr.* pp. 154-194; *Burnham v. Pidcock*, 5 Am. Bankr. R. 590, 68 N. Y. Supp. 1007; *Id.*, 3 N. Bankr. N. 342, 66 N. Y. Supp. 806; *In re Whitehouse*, Fed. Cas. No. 17,564.

It is said that, while the judgment sued on was barred in Colorado, it was not barred in Texas, where it was recovered, nor in Missouri, where the debt was contracted. It is sufficient to say that upon that question the *lex loci* must govern, and, secondly, that the statutes of limitation govern only in the States which enact them, but the statute releasing claims in bankruptcy emanates from the Congress, and is as wide in its operation as all the States and territories. The power to enact such a statute was delegated to the Congress by the States in the constitution. The result follows that the Bankruptcy Act is paramount in its operation to all State statutes in conflict therewith. This question, however, cannot be raised in this court. The question was raised

in the District Court of Colorado, from which no writ of error appears to have been sued out, and that question between the parties is *res adjudicata*.
*The motion is sustained.*¹

IN RE McCAULEY.

DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK,
APRIL 27, 1900.

[Reported in 101 Federal Reporter, 203.]

Orml.
THOMAS, District Judge. Josephine Disler moves to set aside an order made by this court staying proceedings in an action in the Supreme Court of the State wherein said Disler recovered a judgment against the bankrupt for breach of promise to marry. It seems that, under McCauley's promise to marry said Josephine Disler, he effected her seduction, which resulted in the birth of a child; that proceedings were instituted through the commissioner of public charities of the city of New York, borough of Brooklyn, against the bankrupt, wherein the said bankrupt was found guilty, and adjudged to be the father of the child; that on or about the 3d day of October, 1898, the aforesaid action in the Supreme Court was begun; that on October 4, 1898, the defendant was arrested under an order for arrest issued out of the Supreme Court, and thereafter admitted to bail; that on the 24th day of January, 1900, plaintiff recovered judgment against the defendant in such action for \$3,295.80; that execution against his property was issued to the sheriff of the county of Kings; that on the 13th day of March, 1900, the defendant became a voluntary bankrupt in this court; that the schedules annexed to his petition disclose only four alleged creditors, — the plaintiff in the above action, and three others. The aggregated indebtedness of the other three creditors is \$60. The question is whether such judgment is dischargeable in bankruptcy. If it is, the demands of the law must be met, however great the hardship to the plaintiff, and however beneficial it may be to the person who would dishonor his moral obligation. The judgment is based upon a contract, and cannot be withdrawn from the operation of the bankruptcy act. Neither research nor consideration enables the court to reach other conclusion. Hence the motion to vacate the order of injunction is denied.²

¹ Burnham v. Pidcock, 58 N. Y., App. Div. 273, acc. See also *Re Arkell*, 72 N. Y., Supp. 555.

² Disler v. McCauley, 71 N. Y. Supp. 949, *contra*.

In *Re Maples*, 105 Fed. Rep. 919, the District Court for the District of Montana held that a discharge was not a bar to a judgment for the plaintiff's seduction. KNOWLES, D. J., said: "The injuries for which damages were awarded in the above cause, were applied to the person seduced, are certainly personal injuries. Wounded

ALLEN & CO. v. FERGUSON.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1873.

[Reported in 18 Wallace, 1.]

ERROR to the Circuit Court for the Eastern District of Arkansas.

T. H. Allen & Co. sued A. H. Ferguson upon a promissory note, dated March 20, 1867, payable one day after date, with interest.

Ferguson appeared and pleaded his discharge in bankruptcy in bar to the action.

The plaintiffs replied a new promise in writing made while the proceedings in bankruptcy were pending. This promise the plaintiffs averred that they relied upon, and in consequence of it made no efforts

feelings, loss of hope in the future, mental anguish in the disgrace, loss of social standing and position, mortification, humiliation, and sense of dishonor are to be considered in weighing the damage to the father. Much more should they be weighed in considering the damage to the injured woman. These are all injuries that pertain to the person.

"The next point to be considered is, did the bankrupt wilfully and maliciously perpetrate the same? 'Wilful' means 'intentional' or 'deliberate.' It may mean when used in a statute, an intentional and deliberate doing of a wrongful act. How seduction can be other than a wilful act it is difficult to comprehend. Certainly it is done intentionally. A malicious injury may not always include personal ill will or hostility to the person injured. The definition of the term 'malice' given in Rap. & L. Law Dict. is as follows:—

"Malice, in the legal acceptation of the word, is not confined to personal spite against individuals, but consists in a conscious violation of the law to the prejudice of another."

"In the note to *Terwilliger v. Wanda*, 72 Am. Dec. 429, it is said of this term:—

"Malice means a want of legal excuse. This is the sense in which the term is most frequently employed, and it is probably the only sense in which it is properly employed. Substitute "absence of legal excuse" for "malice" in many opinions in the reports which are difficult to be understood, and they will become easily intelligible. . . . Malice, in law, does not mean malice or ill will towards the individual affected by libel or slander. In the ordinary sense of the term, "malice" in law, or absence of legal excuse, is an implication of law from the false and injurious nature of the charge, and differs from actual malice and ill will towards the individual, frequently given in evidence to enhance the damages.' *King v. Root*, 4 Wend. 113; *Pennington v. Meeks*, 46 Mo. 217; *Jellison v. Goodwin*, 43 Me. 287; *Com. v. Goodwin*, 122 Mass. 19-35; *Bigelow, Cas. Torts*, pp. 116, 202, 203.

"Seduction is a criminal offence under the statute law of Montana. See sect. 458, Pen. Code. It therefore cannot be said that there can be any legal excuse for such an injury. When a man with blandishments and promises that are never fulfilled seduces an unmarried woman, knowing well the consequences to her of his acts,—that she will lose her standing in society, that her future will be blighted, that she will be shunned by her own sex, and lose the respect of the opposite sex,—it ought to be held in law that his injury to her is malicious."

In *Re Sullivan*, 1 N. B. N. 380 (referee) it was held that the claim of a father for the seduction of his daughter would be discharged.

In *Colwell v. Tinker*, 71 N. Y. Supp. 952, a judgment for criminal conversation with the plaintiff's wife was held not barred. *Re Tinker*, 99 Fed. Rep. 79 (*semble*), *contra*.

A judgment for breach of promise is barred. *Finnegan v. Hale*, 72 N. Y. Supp. 34.

to collect their debt. The alleged promise was contained in the following letter, which the plaintiffs made part of their replication, viz. :—

“CROCKETT’S BLUFF, ARKANSAS, January 7th, 1868.

“MESSRS. T. H. ALLEN & Co.

“DEAR SIR: I avail myself of this opportunity to give you a fare statement of my pecuniary affa’res. First, I failed to make a crop; secondly, find myself involved as security to the amount of five or eight thousand dollars; was sued, and judgments was render’d against me at the last term of our co’rt for about \$4000, a sum suff’icent to sell all the avai’ble property that I am in possession of. I lost about \$3000 by persons taking the bankrupt law. This is my situation. I was, as you can re’dily conclude, in a bad fix. To remain as I was, at that time, my property would be sold to pay security debts, and my just creditors would not get any part of it, and that I would be redused to insolvency and still ju’gments against me. As a last resort concluded to render a *skedule* myself in order to forse a *prorater* division of my *affects*. The five bales cotton I shipt you was all my crop, to pay you for the meat that you had sent me, to enable me to make the little crop that I did make. The cash that I requested you to send me was, for myself and William Ferguson, to pay his hands for labor; and one hundred and fifty yards of the bag’ing was for W. Ferguson, and one barel of the salt. I have been absent from home for the last two weeks; got home last night, and has not sean him yet, but suppose he has shipt you some cotton. If he has not done so, I will see that he sends you cotton at once. *Be satisf’ed; all will be right. I intend to pay all my just debts, if money can be made out of hired labor. Security debt I cannot pay.* I shall have a hard time, I suppose, this se’son, but will do the best I can.

“JAN. 8.—Since the above was writ’en I have seen William Ferguson. He says he ship’ed you two bales cotton, ten or twelve days ago, and ship’ed in my name, as the baggin’ was order’d by me for him. William Ferguson will be in Memphis betwixt this and the first of March, and will call and see you on bisness matters betwixt me and you’self. *All will be right betwixt me and my just creditors.* Don’t think hard of me. Attribet my poverty to the unprincipe’l’d Yankey. Let me heare from you as usel.

“Yours, very respectfully,

“A. H. FERGUSON.”

To this replication the defendant demurred. The demurrer was sustained by the Circuit Court, and this appeal was taken by the plaintiffs.

Mr. *A. H. Garland*, for the plaintiff in error; Messrs. *Clark* and *Williams*; *contra*.

Mr. Justice HUNT delivered the opinion of the court.

The question is, does the letter of the defendant, set forth in the replication, contain a sufficient promise to pay the debt in suit?

All the authorities agree in this, that the promise by which a dis-

charged debt is revived must be clear, distinct, and unequivocal. It may be an absolute or a conditional promise, but in either case it must be unequivocal, and the occurrence of the condition must be averred if the promise be conditional. The rule is different in regard to the defence of the statute of limitations against a debt barred by the lapse of time. In that case, acts or declarations recognizing the present existence of the debt have often been held to take a case out of the statute. Not so in the class of cases we are considering. Nothing is sufficient to revive a discharged debt unless the jury are authorized by it to say that there is the expression by the debtor of a clear intention to bind himself to the payment of the debt. Thus, partial payments do not operate as a new promise to pay the residue of the debt. The payment of interest will not revive the liability to pay the principal, nor is the expression of an intention to pay the debt sufficient. The question must be left to the jury, with instructions that a promise must be found by them before the debtor is bound. Hilliard on Bankruptcy, 264 to 266, where the cases are collected.

The plaintiffs in error contend that such promise is to be found in the letter of the defendant, forming a part of their replication. They rely chiefly on these expressions: "Be satisfied; all will be right. I intend to pay all my just debts, if money can be made from hired labor. Security debt I cannot pay;" and on the postscript where he adds, "All will be right betwixt me and my just creditors."

There can be no more uncertain rule of action than that which is furnished by an intention to do right. How or by whom is the right to be ascertained? What is right in a particular case? Archbishop Whately says: "That which is conformable to the supreme will is absolutely right, and is called right simply, without reference to a special end. The opposite to right is wrong." This announces a standard of right, but it gives no practical aid. What may be right between the defendant and his creditors is as difficult to determine as if he had no such standard. It is not absolutely certain that it is right for a creditor, seizing his debtor, to say, "Pay me what thou owest," or that it is wrong for the debtor to resist such an attack. It is not unnatural that the creditor should think that payment of the debt was right, and that it was the only right in the case. It is equally natural that the debtor should entertain a different opinion. The law holds it to be right that a debtor shall devote his entire property to the payment of his debts, and when he has done this, that after-acquired property shall be his own, to be held free from the obligation of all his debts, just debts as well as unjust, principal debts as well as security debts. Neither the supreme will, so far as we can ascertain it, nor the laws of the land, require that a debtor whose family is in need, or who is himself exhausted by a protracted struggle with poverty and misfortune, should prefer a creditor to his family; that he should appropriate his earnings to the payment of a debt from which the judgment of the law has released him, rather than to the support of his family or

to his own comfort. What an honest man should or would do under such circumstances it is not always easy to say. When, therefore, the debtor in this case said to the plaintiff, "Be satisfied; I intend to do right; all will be right betwixt my just creditors and myself," he cannot be understood as saying that he would certainly pay his debt, much less that he would pay it immediately, as the plaintiff assumes. What is or what may be right depends upon many circumstances. The principle is impracticable as a rule of action to be administered by the courts. There is no standard known to us by which we are able to say that it is wrong in the defendant not to pay the plaintiff's debt.

We are of the opinion that the letter produced does not contain evidence of a promise to pay the debt in suit, and that the judgment appealed from must be *Affirmed*.¹

¹ In England it was formerly held that a new promise was effectual to bind a discharged bankrupt. *Twiss v. Massey*, 1 Atk. 67; *Trueman v. Fenton*, Cowp. 544; *Brix v. Braham*, 1 Bing. 281; *Roberts v. Morgan*, 2 Esp. 736; *Birch v. Sharland*, 1 T. R. 715. By the Act of 7 George IV. c. 57, it was provided (§ 61) that such promises should not be binding, and similar provisions were contained in the Acts of 1849 and 1861. In the two most recent Acts—those of 1869 and 1883—there is no such provision. Nevertheless the courts still hold the promises in question unenforceable. *Jones v. Phelps*, 20 W. R. 92; *Heather v. Webb*, 2 C. P. D. 1; *Ex parte Barrow*, 18 Ch. D. 464; unless given for new consideration, *Jakeman v. Cooke*, 4 Ex. D. 26; *Re Aylmer*, 1 Manson, 391; after the discharge, *Ex parte Barrow*, 18 Ch. D. 464.

In this country such promises have always been held binding. *Dearing v. Moffitt*, 6 Ala. 776; *Evans v. Carey*, 29 Ala. 109; *Nelson v. Stewart*, 54 Ala. 115; *Wolffe v. Eberlein*, 74 Ala. 99; *Lanagin v. Nowland*, 44 Ark. 84; *Pindall v. Loague*, 56 Ark. 525; *Ross v. Jordan*, 62 Ga. 298; *St. John v. Stevenson*, 90 Ill. 82; *Cheney v. Barge*, 26 Ill. App. 182; *Carey v. Hess*, 122 Ind. 398; *Willis v. Cushman*, 115 Ind. 100; *Knapp v. Hoyt*, 57 Ia. 591; *Corliss v. Shephard*, 28 Me. 550; *Otis v. Gazlin*, 31 Me. 567; *Hussey v. Danforth*, 77 Me. 17, 22; *Yates v. Hollingsworth*, 5 H. & J. 216; *Webster v. Le Compte*, 74 Md. 249; *Maxim v. Morse*, 8 Mass. 127; *Champion v. Buckingham*, 165 Mass. 76; *Craig v. Seitz*, 63 Mich. 727; *Higgins v. Dale*, 28 Minn. 126; *McWillie v. Kirkpatrick*, 28 Miss. 802; *Wislizenus v. O'Fallon*, 91 Mo. 184; *Underwood v. Eastman*, 18 N. H. 582; *Wiggin v. Hodgdon*, 63 N. H. 39; *Shippey v. Henderson*, 14 Johns. 178; *Graham v. O'Hern*, 24 Hun, 221; *Tompkins v. Hazen*, 30 N. Y. App. Div. 359 (*conf.* s. c. 165 N. Y. 18); *Fraley v. Kelly*, 88 N. C. 227; *Earnest v. Parker*, 4 Rawle, 452; *Murphy v. Crawford*, 114 Pa. 496; *Harris v. Peck*, 1 R. I. 262; *Lanier v. Tolleson*, 20 S. C. 57; *Moseley v. Coldwell*, 3 Bax. 208; *Farmers v. Flint*, 17 Vt. 508.

The new promise must, however, be clear and free from ambiguity. Expressions of expectation or of good intentions are insufficient. *Mucklow v. St. George*, 4 Taunt. 613; *Lynbui v. Weightman*, 5 Esp. 198; *Brook v. Wood*, 13 Price, 667; *Dearing v. Moffitt*, 6 Ala. 776; *Shockey v. Mills*, 71 Ind. 288; *Bartlett v. Peck*, 5 La. Ann. 669; *United Society v. Winkley*, 7 Gray, 460; *Bigelow v. Norris*, 139 Mass. 12; *Smith v. Stanchfield* (Minn.), 87 N. W. Rep. 917; *Stewart v. Reckless*, 4 Zab. 427; *Roosevelt v. Mark*, 6 Johns. Ch. 266; *Yoxtheimer v. Keyser*, 11 Pa. 364; *Brown v. Collier*, 8 Humph. 510; *Moseley v. Coldwell*, 3 Bax. 208. *Conf.* *Bolton v. King*, 105 Pa. 78; *Taylor v. Nixon*, 4 Sneed, 352.

Part payment does not revive the obligation. *Tolle v. Smith*, 98 Ky. 464; *Merriam v. Bayley*, 1 Cush. 77; *Inst. for Savings v. Littlefield*, 6 Cush. 210; *Jacobs v. Carpenter*, 161 Mass. 16; *Stark v. Stinson*, 23 N. H. 259; *Lawrence v. Harrington*, 122 N. Y. 408; *Wheeler v. Simmons*, 60 Hun, 404.

A conditional promise is effectual, but the condition must happen: *Beaford v.*

Saunders, 2 H. Bl. 116; Campbell v. Sewell, 1 Chitty, 609; Dearing v. Moffitt, 6 Ala. 776; Branch Bank v. Boykin, 9 Ala. 320; Mason v. Hughart, 9 B. Mon. 480; Carson v. Osborn, 10 B. Mon. 155; Tolle v. Smith, 98 Ky. 464; Yates, Adm., v. Hollingsworth, 5 Har. & J. 216; Randidge v. Lyman, 124 Mass. 361; Elwell v. Cumner, 136 Mass. 102; Scouton v. Eislord, 7 Johns. 36; Kingston v. Wharton, 2 S. & R. 208; Taylor v. Nixon, 4 Sneed, 352; Sherman v. Hobart, 26 Vt. 60; or be waived: Tompkins v. Hazen, 51 N.Y. Supp. 1003.

It has been held in a few cases that some express acceptance of the condition on the part of the creditor is necessary. Craig v. Brown, 3 Wash. C. C. 503; Samuel v. Cravens, 10 Ark. 380; Smith v. Stanchfield (Minn.), 87 N. W. Rep. 917.

A new promise is valid though made before the discharge is granted. Roberts v. Morgan, 2 Esp. 736; Brix v. Braham, 1 Bing. 281; Earle v. Oliver, 2 Ex. 71; Kirkpatrick v. Tattersall, 13 M. & W. 766; Lanagin v. Nowland, 44 Ark. 84; Knapp v. Hoyt, 57 Ia. 591; Corliss v. Shepherd, 28 Me. 550; Otis v. Gazlin, 31 Me. 567; Lerow v. Wilmarth, 7 Allen, 463; Wiggin v. Hodgdon, 63 N. H. 39; Stilwell v. Coope, 4 Denio, 225; Fraley v. Kelly, 67 N. C. 78; Hornthal v. McRae, 67 N. C. 21. But see *contra*, Ogden v. Redd, 13 Bush, 581; Graves v. McGuire, 79 Ky. 532. And it has been held valid in Pennsylvania, though made before bankruptcy proceedings have been begun. Kingston v. Wharton, 2 S. & R. 208; Haines v. Stauffer, 13. Pa. 541. These cases would probably not be followed elsewhere. Reed v. Frederick, 8 Gray, 230; Lowell on Bankruptcy, § 249.

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